

STB FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
 NORFOLK SOUTHERN CORPORATION AND
 NORFOLK SOUTHERN RAILWAY COMPANY
 --CONTROL AND OPERATING LEASES/AGREEMENTS--
 CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 96 ¹

 Decided October 19, 1998

The Board addresses certain issues raised in this proceeding and clarifies
CSX Corp. et. al. - Control - Conrail, Inc., et al., 3 S.T.B. 196 (1998)
 (Decision 89), to the extent, and in the manner, indicated in this decision.

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BY THE BOARD:

INTRODUCTION

In *CSX Corp. et al. – Control – Conrail, Inc., et al.*, 3 S.T.B. 196 (1998) (*Decision No. 89*), we approved, subject to certain conditions, the acquisition of control of Conrail Inc. (CRR) and Consolidated Rail Corporation (CRC), and the division of the assets thereof, by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR).² Acquisition of control of Conrail was effected by CSX and NS on the Control Date, which was August 22, 1998 (the effective date of *Decision No. 89*).³ The division of the assets of Conrail has not yet been effected; it will be effected on a date not yet determined (that date is generally referred to as Day One; it has also been referred to as the Closing Date and the Split Date).⁴

• *This Decision (Petitions)*. In this decision, we address the issues raised in the following pleadings,⁵ each of which seeks, in essence, either reconsideration and/or clarification of one or more aspects of *Decision No. 89*:⁶ the CSX/NS-209 petition for reconsideration, filed August 12, 1998, by CSX and NS; the CSX-160 petition for clarification, filed August 12, 1998, by CSX; the APL-27 petition for clarification, filed August 12, 1998, by APL Limited (APL); the undesignated application in the nature of a petition, filed August 12, 1998, by

² CSXC and CSXT and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as New York Central Lines LLC (NYC), are referred to collectively as CSX. NSC and NSR and their wholly owned subsidiaries, and also the wholly owned CRC subsidiary to be known as Pennsylvania Lines LLC (PRR), are referred to collectively as NS. CRR and CRC, and also their wholly owned subsidiaries other than NYC and PRR, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants (or, sometimes, the primary applicants).

³ The effective date of *Decision No. 89* was August 22, 1998. See, *Decision No. 89*, 3 S.T.B. at 396 (ordering paragraph 83). The references elsewhere in that decision to a different effective date, see *Decision No. 89*, 3 S.T.B. at 366-71 (indicating that the effective date would be August 23, 1998), were not correct.

⁴ The public will receive at least 14 days' prior notice of the date that will be designated as Day One. See, *Decision No. 89*, 3 S.T.B. at 385 (ordering paragraph 3).

⁵ We do not address, in this decision, the issues raised in two additional pleadings: the INRD-1 petition for leave to intervene, filed August 12, 1998, by Indiana Rail Road Company (INRD); and the INRD-2 petition for reconsideration, filed August 13, 1998, by INRD. See, *Decision No. 93* (denying the INRD-1 petition for leave to intervene, and thereby effectively rejecting the INRD-2 petition for reconsideration).

⁶ The CSX-160 pleading also seeks clarification of *Decision No. 87*.

United States Rep. Jerrold Nadler and 23 other Members of the United States House of Representatives (referred to collectively as the Nadler Delegation);⁷ the undesignated appeal in the nature of a petition, filed August 24, 1998, by Ms. Zee Frank; the TFI-8 petition for clarification or reconsideration, filed August 12, 1998, by The Fertilizer Institute (TFI); the IP&L-15 petition for clarification or reconsideration, filed August 12, 1998, by Indianapolis Power & Light Company (IP&L); the undesignated letter in the nature of a petition, filed July 29, 1998, by the Ohio Rail Development Commission (ORDC);⁸ the WC-19 petition for partial reconsideration of monitoring and reporting conditions, filed August 12, 1998, by Wisconsin Central Ltd. (WCL);⁹ the WLE-9 reconsideration/clarification petition, filed August 12, 1998, by Wheeling & Lake Erie Railway Company (W&LE);¹⁰ the SDB-15 petition for reconsideration, filed August 11, 1998, by the Stark Development Board, Inc. (SDB);¹¹ the RBMN-10 petition to reopen and to clarify, filed August 12, 1998, by Reading Blue Mountain & Northern Railroad Company (RBMN); the FCC-18 petition for reconsideration, filed August 12, 1998, by the Four City Consortium (Four Cities, an association of the Four Cities of East Chicago, Hammond, Gary, and Whiting, IN); the undesignated letter in the nature of a petition, filed August 12, 1998, by the New Jersey Department of Transportation

⁷ The members of the Nadler Delegation, each of whom is a Member of the United States House of Representatives from either New York or Connecticut, are, as of August 12, 1998: the Hon. Jerrold Nadler, the Hon. Christopher Shays, the Hon. Charles Rangel, the Hon. Ben Gilman, the Hon. Barbara Kennelly, the Hon. Nancy Johnson, the Hon. Charles Schumer, the Hon. Rosa DeLauro, the Hon. Michael Forbes, the Hon. Sam Gejdenson, the Hon. Nita Lowey, the Hon. Major Owens, the Hon. Thomas Manton, the Hon. Maurice Hinchey, the Hon. Ed Towns, the Hon. Carolyn B. Maloney, the Hon. Nydia M. Velazquez, the Hon. Gary Ackerman, the Hon. Eliot L. Engel, the Hon. Louise M. Slaughter, the Hon. John LaFalce, the Hon. Michael McNulty, the Hon. James Maloney, and the Hon. Gregory Meeks.

⁸ The letter filed July 29, 1998, by ORDC will hereinafter be referred to as ORDC's July 29th letter.

⁹ Although WCL previously filed a responsive application in STB Finance Docket No. 33388 (Sub-No. 59), the WC-19 petition has been filed in STB Finance Docket No. 33388, and not in the Sub-No. 59 sub-docket.

¹⁰ The WLE-9 petition was filed in STB Finance Docket No. 33388 (Sub-No. 80).

¹¹ The SDB-15 petition purports to be filed in STB Finance Docket No. 33388 (Sub-No. 79), as if SDB had previously filed a responsive application in the Sub-No. 79 sub-docket. As has already been noted, however, the SDB-4 submission filed on or about October 21, 1997, has not been regarded as a responsive application. See, *Decision No. 53*, at 3. We will therefore treat the SDB-15 petition as if it had been filed in STB Finance Docket No. 33388.

and New Jersey Transit Corporation;¹² the undesignated letter in the nature of a petition, filed August 4, 1998, by Livonia, Avon & Lakeville Railroad Corporation (LAL);¹³ and the undesignated request to withdraw comments in opposition, filed July 22, 1998, by Citizens Gas & Coke Utility (CG&C).¹⁴ The requests for relief contained in these pleadings, and the arguments advanced in support of such requests, are summarized in Appendix A.

This Decision (Replies). We have considered, in this decision, the following responsive pleadings:¹⁵ the CSX/NS-210, -211, -212, -213, and -214 replies, filed August 27, 1998, by CSX and NS; the CSX/NS-215, -216, and -217 responses, filed August 27, 1998, by CSX and NS; the CSX-162 response, filed August 27, 1998, by CSX; the CSX-163 reply, filed August 27, 1998, by CSX; the NYS-29 reply, filed August 31, 1998, by the State of New York, acting by and through its Department of Transportation (NYDOT); the undesignated statement filed August 31, 1998, by Prairie Group (hereinafter referred to as Prairie Group's August 31st statement); the IMRL-9 reply, filed September 1, 1998, by I & M Rail Link, LLC (I&M); the APL-28 response, filed September 1, 1998, by APL;¹⁶ the WYANDOT-7 reply, filed September 1, 1998, by Wyandot Dolomite, Inc. (Wyandot); the NLS-10 response, filed September 1, 1998, by National Lime and Stone Company (NL&S); the NYCH-5 reply, filed September 1, 1998, by New York Cross Harbor Railroad (NYCH); the NYAR No. 7 reply, filed September 1, 1998, by New York & Atlantic Railway (NYAR); the ISRR-11 reply, filed September 1, 1998, by Indiana

¹² The New Jersey Department of Transportation is referred to as NJDOT. New Jersey Transit Corporation and its commuter rail operating subsidiary (New Jersey Transit Rail Operations, Inc., known as NJTRO) are referred to collectively as NJTC. NJDOT and NJTC are referred to collectively as NJT. See, *Decision No. 89*, 3 S.T.B. at 434-35 n.365. The letter filed August 12, 1998, by NJT will hereinafter be referred to as NJT's August 12th letter.

¹³ Although LAL previously filed a responsive application in STB Finance Docket No. 33388 (Sub-No. 39), its undesignated letter filed August 4, 1998 (hereinafter referred to as LAL's August 4th letter), has been filed in STB Finance Docket No. 33388, and not in the Sub-No. 39 sub-docket.

¹⁴ The undesignated request filed July 22, 1998, by CG&C will hereinafter be referred to as CG&C's July 22nd request.

¹⁵ We do not consider, in this decision, two additional responsive pleadings: the IP&L-16 and -17 replies filed September 1, 1998, by IP&L. See, *Decision No. 93* (denying and effectively rejecting, respectively, the two pleadings to which the IP&L-16 and -17 replies were responsive: the INRD-1 intervention petition and the INRD-2 reconsideration petition). Nor do we consider, in this decision, the undesignated letter filed September 1, 1998, by Empire Wholesale Lumber Co. This letter, which expresses support for the WLE-9 petition, does not appear to have been served on all parties of record.

¹⁶ We have also considered the undesignated letter filed September 3, 1998, by CSX (this letter, which is in the nature of a response to APL-28, is hereinafter referred to as CSX's September 3rd letter).

Southern Railroad, Inc. (ISRR);¹⁷ the CLEV-21 reply, filed September 1, 1998, by the City of Cleveland, Ohio; the two undesignated letters, each in the nature of a reply (one addressing the WLE-9 petition, the other addressing the Wyandot/NL&S component of the CSX/NS-209 petition), filed September 1, 1998, by ORDC;¹⁸ the undesignated letter, in the nature of a reply, filed September 1, 1998, by Bayer Corporation (Bayer);¹⁹ and the undesignated response filed September 2, 1998, by Indiana Harbor Belt Railroad Company (IHB).²⁰ The arguments presented in these pleadings are summarized in Appendix A.

DISCUSSION AND CONCLUSIONS

APPLICABLE STANDARDS. A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or changed circumstances. 49 U.S.C. 722(c); 49 CFR 1115.3(b). *See, e.g., Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver And Rio Grande Western Railroad Company*, Finance Docket No. 32760 (UP/SP), *Decision No. 60*, at 4 (STB served November 20, 1996).

A prior decision may be clarified in any instance in which there appears to be a need for a more complete explanation of the action taken therein. *See, e.g., UP/SP, Decision No. 57* at 3 (STB served November 20, 1996). A decision clarifying a prior decision is, in many respects, the functional equivalent of a

¹⁷ We have not considered, in this decision, the portion of the ISRR-11 reply (ISRR-11 at 9-11) that is responsive to the INRD-1 and -2 pleadings (the pleadings that were denied and effectively rejected, respectively, in *Decision No. 93*).

¹⁸ The letter addressing the WLE-9 petition will hereinafter be referred to as ORDC's September 1st letter respecting WLE-9. The letter addressing the Wyandot/NL&S component of the CSX/NS-209 petition will hereinafter be referred to as ORDC's September 1st letter respecting CSX/NS-209.

¹⁹ The letter filed September 1, 1998, by Bayer will hereinafter be referred to as Bayer's September 1st letter.

²⁰ "Indiana Harbor Belt Railroad Company" is apparently IHB's correct name. *See* the undesignated response filed September 2, 1998, at 1 and 4 (this response, hereinafter referred to as IHB's September 2nd response, is signed by IHB's general counsel). *Decision No. 89* referred to IHB by two names. *See, e.g., Decision No. 89*, 3 S.T.B. at 229 ("Indiana Harbor Belt Railway") and 3 S.T.B. at 291 ("Indiana Harbor Belt Railroad Company").

declaratory order. Where appropriate, we have treated petitions for clarification as petitions for reconsideration.

APPLICANTS. In CSX/NS-209, applicants seek clarification of certain of our conditions related to (a) shippers who lose single-line service and (b) communities that will experience environmental harm from increased noise. In CSX-160, CSX seeks "clarification" that it can share confidential APL Limited contract information with its affiliate CSX Intermodal, Inc. (CSXI).

a. *Stone Shippers' Loss of Single-Line Routings.* In *Decision No. 89*, we found that the transaction, by allocating Conrail's route system to CSX and NS, would create about six times as many new single-line movements as it eliminated. We also found that, in general, the transaction would result in only modest harm to those shippers whose single-line Conrail service would be replaced by somewhat less efficient joint-line NS/CSX service. We explained that it would unduly interfere with applicants' proposed operations and be a substantial overreach for us to require applicants to undertake a fundamental restructuring of the procompetitive transaction applicants had proposed by giving either CSX or NS trackage rights to permit those shippers access to two carriers simply to ensure continuation of single-line service. Instead, we determined that the appropriate remedy for this limited harm was the creative solution for transitional relief agreed to between applicants and the National Industrial Transportation League (NITL).²¹ Under that agreement, where Conrail single-line rates have been lost, CSX and NS must freeze existing rates for 3 years,²² and must work with affected shippers to provide fair and reasonable joint-line service.

We made only two exceptions to this general relief. In one instance, we permitted a Class III carrier to continue to provide service in combination with one Class I carrier rather than having to connect with a CSX/NS routing. We were able to do this without requiring CSX or NS to operate over each other's track. Second, we provided remedies for the benefit of two aggregate shippers, National Lime and Stone (NL&S) and Wyandot Dolomite, Inc. (Wyandot), based largely on relief proposed by applicants.

Applicants raise an issue concerning the duration of our condition (ordering paragraph No. 43) governing certain movements of aggregates by Wyandot and NL&S. While this condition does not specify any time limit, applicants argue that the requirement that CSX and NS "must adhere to their offer to provide

²¹ The NITL agreement is the settlement agreement that applicants entered with the National Industrial Transportation League (NITL). See, *Decision No. 89*, 3 S.T.B. at 251-57, 449-51.

²² An inflation adjustment is permitted.

single-line service for all existing movements of aggregates" necessarily incorporates the 5-year time limit contained in applicants' June 6, 1998, Proffer of Conditions.

Wyandot and NL&S, supported by ORDC, disagree, arguing that the lack of any specific time frame in our condition indicates that we intended to give them the permanent relief that they had requested, and not simply a temporary remedy. Wyandot also characterizes applicants' petition as a request for reconsideration, and argues that applicants have not shown material error or demonstrated that new evidence or changed circumstances warrant the relief that is sought.

We believe that this issue does require clarification. In *Decision No. 89*, we stated that we would "require applicants to provide single-line service for all existing movements of aggregates as offered at oral argument, provided they are tendered in unit trains or blocks of 40 or more cars." We also recognized that "what was offered at oral argument is somewhat broader than what was offered in the proffers dated June 6, 1998." *Id.* at 111. Thus, applicants' "offer" referred to in Ordering Paragraph No. 43 is the one made at oral argument. There, in explaining why he believed Wyandot and NL&S were not satisfied with applicants' offer — which had already been accepted by a similarly situated Ohio aggregate shipper, Martin Marietta Materials (MMM) — NS' counsel stated: "I suppose that they [Wyandot and NL&S] want more and want to be able to have single-line service for the rest of time to wherever they want to go. We don't, with all respect, think that's a reasonable request." Original Oral Arg. Tr. (June 4, 1998) at 374.

We did expand upon applicants' written proffer by applying it to all qualifying existing movements of aggregates, and by extending some relief for new movements, and we believe that those expansions were appropriate. Nevertheless, we believe that permanent relief is unnecessary, would be contrary to the public interest, and would be inconsistent with applicants' proffer. Accordingly, our condition will specifically include a 5-year term from Day 1, the term that was offered by applicants. This period should allow these shippers sufficient time to make adjustments to the altered business environment brought about by this transaction. Limiting the duration of the relief accorded Wyandot and NL&S is consistent with the MMM settlement and with the relevant terms of the NITL agreement. Permanent relief would unduly interfere with the operations of both applicants and impair their operating flexibility, which we believe is the real key to efficient, economical operations from which all shippers ultimately benefit. Nonetheless, because of the uniqueness of these shippers, and because we do not as yet have any firm projections of the inefficiencies the relief we have crafted will impose on the nation's rail system

and the public interest, we will permit these shippers the opportunity, during the course of our oversight of this transaction, to keep us apprised of their need for continued single-line service as measured against the costs and inefficiencies this would impose on CSX and NS.

b. *Noise Conditions.* Applicants also seek clarification of our Environmental Condition No. 11 imposing noise mitigation to address adverse impacts resulting from merger-related increases in train traffic. That condition directs that applicants' noise mitigation should have an engineering design goal of a 10 decibel (dBA) reduction with a required noise reduction of 5 dBA. Applicants are concerned that Condition No. 11 could be read to specify a 10 dBA design goal for noise mitigation for those receptors on all rail line segments that meet the wayside noise mitigation criteria, even where the projected increase in noise level is less than 10 dBA. Applicants suggest that we amend the condition to reduce that design goal to either 10 dBA *or* the projected increase in noise for the line segment, whichever is less. We continue to believe that the design goal in Condition No. 11 is reasonable and appropriate. Noise mitigation combining a design goal of a 10 dBA reduction with a requirement that noise actually be reduced by at least 5 dBA has become standard practice for federal agencies, including the Federal Highway Administration, the Federal Aviation Administration, and state departments of transportation. The 10 dBA noise reduction design goal provides assurance that the most severely affected noise receptors would experience an actual noise reduction of at least 5 dBA. To ensure that noise mitigation is effective and meaningful, we will retain the design goal of Condition No. 11.²³

CSX further requests that we amend Environmental Condition No. 26(C) with respect to the required locations for Wheel Impact Load Detectors (WILDs) on the east and west of Cleveland. CSX states that it has an existing WILD located about 60 miles east of Cleveland in West Springfield, PA. CSX maintains that an additional WILD 20 miles east of Cleveland would provide little additional benefit, and the City of Cleveland concurs. CSX's request seems reasonable and appropriate, and therefore, Environmental Condition No. 26(C) will be modified to delete this requirement.²⁴

As for the WILD on the west side of Cleveland (which Condition No. 26(C) requires to be installed near Olmsted Falls, OH), CSX asks for flexibility on

²³ CSX also notes in a footnote that the increase in traffic on the line segment between Toledo and Deshler, OH, is not acquisition-related and suggests, by inference, that Environmental Condition No. 11 should not apply to this rail line segment. As CSX did not specifically request that we amend any of our environmental mitigation for this line segment, we will not amend this condition.

²⁴ The full text of our revised environmental conditions is attached as Appendix B.

location of the WILD and additional time to complete its engineering evaluation. The City of Cleveland agrees that CSX should have flexibility as long as the WILD is located within 60 miles of Cleveland and is designed to inspect all tracks at that location (including double tracks). Given these circumstances, we will modify the condition to permit CSX to locate the required WILD anywhere on the line segment between Berea and Greenwich, if it is within 60 miles of Cleveland and is designed to inspect all tracks, including double tracks.²⁵

c. *Access of CSX Intermodal to APL Contracts.* CSX seeks clarification that immediately after the control date it will be permitted to share confidential APL/Conrail contract information with its affiliate, CSXI. CSX points out that CSXI is the entity within the CSX corporate family that is responsible for the marketing and administration of all intermodal traffic. CSX claims that it would be inefficient to create special procedures to administer these functions without CSXI. It has agreed to a condition that CSXI shall use this confidential information only to administer the contract and not for any competitive purpose.

APL reluctantly agrees to this result, stating in its filing that it is "not interested in erecting artificial barriers that would prevent a railroad from providing the high standard of service required by APL." APL states that it "is willing to agree that the [contract information] could be made available to CSXI, but only so long as CSXI becomes a signatory [to the contracts] * * *."²⁶ CSX has essentially agreed to do so.

Although we agree with APL that CSX is seeking reconsideration, not clarification, we believe that the relief that CSX seeks is appropriate. Provided CSX adheres to the condition it has agreed to concerning use of the information, and provided CSXI will agree to be bound, jointly and severally with CSXT to the performance of the contracts as requested by APL, we do not believe that commercially sensitive APL information will be compromised.

APL LIMITED (APL) seeks "clarification" that, under the provisions of *Decision No. 89, 180 days*²⁷ after Day 1 shippers may invoke antiassignment clauses of their existing contracts without terminating the contract. In other

²⁵ If CSX's engineering study ultimately determines that a WILD would be more efficient and effective at a different location, CSX would have to request approval for such a change. See, *Environmental Condition No. 26(C)*.

²⁶ See, *Decision No. 89, 3 S.T.B. at 480--83* (discussion of the APL/Conrail contract, which is sometimes referred to as a transportation services agreement or TSA). Although the record contains several references to multiple APL/Conrail "contracts," see, e.g., APL-27 at 1 (reference to "the existing [APL/Conrail] rail transportation contract").

²⁷ APL points out that at times we refer to "180 days," and at other times we refer loosely to "6 months." In all cases, we mean 180 days.

words, it asks that shippers such as APL should be able to have a choice to begin applying existing contract terms to either CSX or NS. We thoroughly explained in *Decision No. 91* (STB served August 19, 1998), that we did not intend that result in *Decision No. 89*. Nor do we think that result would be appropriate. If APL seeks to exercise an antiassignment or other similar clause, it needs to invoke it.²⁸ If it is successful in terminating the contract, then it is free to deal with either CSX or NS.²⁹

THE NADLER DELEGATION renews its requests that we impose numerous conditions to make New York City a shared assets area and to compel applicants and neutral railroads to participate in a plan to reroute rail traffic across the New York harbor that is now routed by way of Albany.³⁰ Those arguments were adequately addressed and rejected in *Decision No. 89*, and we will not revisit them here. In this regard, we note that petitioner has presented no evidentiary basis for its argument that there is an "acknowledged failure" of the New York Cross Harbor Railroad (NYCH) to provide needed service over a substantial period of time. Neither the Interstate Commerce Commission (ICC) nor this Board (which has plenary jurisdiction over common carrier service issues) has found that NYCH has failed to respond to reasonable requests for service. No testimony by shippers has been provided indicating that NYCH's service has been in any way inadequate. The lack of such evidence precludes a grant of the Nadler Delegation's request that we grant a feeder line application to force a sale of NYCH to applicants under 49 U.S.C. 10907(c)(1). The situation appears to be that there has been relatively little demand for cross harbor rail service, not that NYCH has been unwilling or unable to provide it. Similarly, we continue to believe that no basis has been provided for requiring New York & Atlantic Railway (NYAR) to make its tracks available to CP or any other railroad as part of the plan that the Nadler Delegation proposes.

²⁸ If it wants to invoke that option, it must give 30 days' notice. It may give notice on the 150th day, or any time thereafter.

²⁹ We remain unpersuaded that APL should be afforded special relief because the exercise of such a clause in the APL/Conrail transportation contract may result in the termination of APL's lease of a portion of Conrail's South Kearney, NJ, yard. Again, as with any other contract subject to the override, whatever termination rights APL had immediately before the override, APL will have at the conclusion of the override period. And any uniqueness associated with the fact that Sea-Land Services, Inc., a part of CSX, is a competitor to APL has been addressed through conditions that have been imposed to protect the exchange of commercially sensitive information.

³⁰ This petition is supported by a letter from Zee Frank who has requested a waiver of the requirement to serve all parties. That request will be denied as no justification has been presented for that relief, and her pleading will not be considered.

The Nadler Delegation now argues for the first time that *any* increase in emissions violates the State of New York's state implementation plan (New York Plan) created to comply with the State's responsibility under the Clean Air Act. As we pointed out in *Decision No. 89*, 3 S.T.B. at 360-61 & n.248, the Clean Air Act General Conformity Rules (40 CFR 93, Subpart B) do not apply in this proceeding. As we explained there, the agency needs to make a determination whether the federal action conforms to the requirements of the state implementation plan only if those rules apply. And those rules are not applicable in this case because the Board does not exercise continuing program control over rail operations. Further, as noted in *Decision 89*, we have ample evidence demonstrating that the net air quality impacts here will be de minimis.³¹

Moreover, our Section of Environmental Analysis (SEA) has now consulted with the New York Department of Environmental Conservation, Bureau of Air Quality Planning, concerning the New York Plan as it relates to truck traffic in the New York City metropolitan area. That agency advises that there are no current requirements in the New York Plan calling for a reduction in truck traffic in the area. SEA was also informed by that agency that a recently proposed revision of the New York Plan for ozone in the New York City area contains no requirement to reduce truck traffic. Therefore, there is no basis for the Nadler Delegation's assertion that the relatively minor, localized increases in truck traffic related to this transaction would be inconsistent with the New York Plan.

The Nadler Delegation also argues that a ban has been imposed by the New York Metropolitan Transit Authority (NYMTA) barring garbage traffic from all NYMTA railways on Long Island, which means that the garbage has to go through minority neighborhoods in the South Bronx. NYMTA has apparently reached an agreement with NYAR for a temporary moratorium on garbage transport until December of 1999. This action is outside of our jurisdiction and control. The Nadler Delegation claims that we have made this situation worse by forcing all garbage traffic onto what it characterizes as a "circuitous" route, thus allegedly violating the Civil Rights Act of 1964. The transaction has no impact on the routing of this particular traffic; most of Conrail's New York City traffic was routed north to Albany before the transaction, and most of applicants' New York City traffic will continue to be routed that way. This argument is really just a variant of the Nadler Delegation's argument that we should impose

³¹ We have required applicants to file reports concerning truck traffic to and from their New Jersey and New England intermodal terminals that will permit us to monitor whether there are any significant, unforeseen, transaction-related truck traffic increases over the George Washington Bridge.

numerous conditions to encourage or force applicants to route more traffic across the New York Harbor, relief that has not been justified in this proceeding.

Finally, the Nadler Delegation requests that all action on its petition for reconsideration be stayed until July 20, 1999, to permit negotiation between the Nadler Delegation and applicants. We do not believe that any purpose would be served by such a stay. While we encourage the parties to continue to negotiate mutually beneficial settlements, we have already imposed ample relief for transaction-related harms in this area.³² It would not be in the public interest to delay the administrative finality of this proceeding for a year or more, especially when that could interfere with attempts by various parties to pursue judicial review.

INDIANAPOLIS POWER & LIGHT COMPANY (IP&L), supported by Indiana Southern Railroad (ISRR), has raised a number of criticisms of *Decision No. 89*, and has requested additional conditions.³³ Under the transaction, the Conrail line serving IP&L's Stout plant has been allocated to CSX. While our decision required a new competitive NS rail routing into IP&L's Stout plant via an interchange at milepost 6, IP&L now asserts for the first time that "there is no interchange point at milepost 6.0, nor could interchange occur there." Similarly, ISRR states that an interchange at milepost 6 is "operationally impractical," because there are no sidetracks at that point, and there is not sufficient right-of-way to construct any.³⁴ IP&L explains that, while this is the point where ownership changes, the physical interchange between ISRR and Conrail has taken place at Crawford Yard, west of Indianapolis. IP&L wants assurance that ISRR and NS can continue to interchange the same way that Conrail and ISRR did. CSX indicates in response that Crawford Yard may not be an appropriate interchange point because it is a small, heavily used facility that might not be able to accommodate this traffic.

³² We also reject the Nadler Delegation's claim that existing rail infrastructure east of the Hudson River is inadequate to support the additional rail access made possible through our merger conditions imposed in *Decision No. 89*. See, *id.*, 3 S.T.B. at 283 n.130, where we explained our view that the line from Fresh Pond to Albany has ample capacity for this purpose.

³³ IP&L challenges our statement that it abandoned its merger premium studies on brief. Although IP&L did mention those studies in passing in its brief, it made no attempt to rebut the extensive criticisms of them contained in the verified statements submitted by applicants' expert witnesses, criticisms that we continue to find persuasive. IP&L also renews its objection to the trackage rights fee of 29 cents per mile that applicants have agreed to charge where they operate over each other's tracks to prevent a reduction in competition due to this transaction, but it provides no analysis to support its objection.

³⁴ Despite the fact that the United States Department of Justice (DOJ) strongly advocated an interchange at milepost 6 on brief, neither IP&L nor ISRR raised this issue at oral argument.

It was our intent in imposing relief at the Stout plant, including an interchange at milepost 6, to ensure efficient and competitive service, including service from coal origins on ISRR. DOJ, the primary advocate of the NS/ISRR interchange at milepost 6, explained that this remedy, together with direct access by NS at Stout, was necessary to permit NS to compete as Conrail does now at Stout. From the record before us, we cannot determine whether an interchange at milepost 6 is sufficient to provide the relief we contemplated. Accordingly, we will direct applicants and ISRR to negotiate a mutually satisfactory solution to this problem and report back to us in 60 days. If the parties are unable to agree on a solution, we will fashion one.³⁵

We continue to believe that no special relief has been justified at Perry K. We denied the specific relief requested by IP&L of permitting direct access to a second rail carrier to its Perry K plant on the basis of the one-lump theory. Because Perry K was served by a single rail carrier at destination, vertical integration with one of the origin carriers would not create new market power. *Decision No. 89*, 3 S.T.B. at 319. IP&L now argues that Perry K was not a bottleneck shipper because Conrail's sole ownership of a "switching" segment did not create a bottleneck, or because motor competition precluded Perry K from being a bottleneck shipper. Neither argument advances IP&L's position concerning Perry K.

First of all, whether Conrail's rates were switching rates or divisions of joint rates, its ability to obtain any of the rents available from the movement was the same. And, as noted, IP&L also argues that it was not really a bottleneck shipper at Perry K before the merger because IP&L could bypass Conrail by moving coal in competitive rail service to Stout, then trucking it to Perry K. While Conrail's rates to Perry K may have been effectively constrained by the threat of trucking coal from Stout to Perry K, that competition has been preserved through the merger conditions we have imposed. Stout will be served directly by two railroads, meaning the rail rate to Stout will be as competitive as before or more so. Thus, as necessary to provide competitive pressure, coal can continue to be transloaded at Stout for truck movement to Perry K. Given the small amount of coal used at Perry K and the shortness of the truck movement from Stout, this rail-truck competitive option that we have preserved makes unnecessary any further remedy specific to Perry K.

³⁵ IP&L requests a ruling that, if NS or ISRR serve Stout "directly," neither CSX nor Indiana Rail Road Company (INRD) will be permitted to impose a switching charge at Stout. CSX concedes this point. We will revise our order in *Decision No. 89* to reflect this change.

Moreover, the one-lump theory does not presuppose, as IP&L assumes, that a bottleneck rail carrier has any market power in the first place; it simply predicts that the merger of the bottleneck destination rail carrier with one or more origin rail carriers will not increase whatever market power it does have. The existence of rail-motor or other competitive options in no way undercuts this analysis. Perry K retains competitive access to two rail carriers, CSX (directly) and NS (through a cost-based switching condition with no term limit). The bottom line is that IP&L has not justified any remedy with regard to service at Perry K.

IP&L also seeks a clarification that its Perry K shipments moving over NS will not have to be routed through Hawthorne Yard. Although we did say in *Decision No. 89* that IP&L might be able to take advantage of the interchange between NS and ISRR at milepost 6 for movements to Perry K as well as to Stout, we did not mean to create a right for IP&L to be able to dictate the interchange point for NS and CSX or its subsidiary, or to be able to insist on avoiding an interchange at Hawthorne Yard. This request for clarification will be denied.

IP&L also wants to avoid paying *any* switching charge at Perry K. Applicants have agreed to, and we have imposed, a condition guaranteeing cost based switching to Perry K (with a \$250 ceiling, adjusted for inflation). IP&L has provided no basis for avoiding a switching charge altogether where CSX or INRD perform a switching service. This IP&L request will also be denied.

THE FERTILIZER INSTITUTE (TFI)³⁶ contends that we are required by the statute to use the RCAF-A³⁷ rather than the RCAF-U whenever an adjustment factor is included in one of our merger conditions, except with regard to switching charges, where it has agreed that an RCAF-U is appropriate. In particular, TFI claims that the RCAF-A must be used in connection with the trackage rights fee of 29 cents per mile that applicants have agreed to charge each other where they will operate over each other's lines to prevent a lessening of competition due to this transaction.³⁸ TFI also claims that we were required

³⁶ IP&L endorses TFI's RCAF argument, and asks that we clarify that the RCAF-A must be the adjustment mechanism for the trackage rights fee that CSX will be charging to NS in the Indianapolis area.

³⁷ The RCAF-A refers to the Rail Cost Adjustment Factor, adjusted to reflect productivity gains. The RCAF-U refers to the unadjusted index.

³⁸ Those trackage rights agreements provide for a negotiated adjustment factor that is neither the RCAF-U nor the RCAF-A. We thoroughly examined trackage rights compensation in *Decision No. 89*, 3 S.T.B. at 343-45, and found that it will permit these carriers to compete effectively with each other.

by statute to apply an RCAF-A adjustment factor with regard to our condition imposing a 3-year freeze on certain interline rates that derives from the NITL agreement.³⁹

TFI's claim that section 10708 requires us to use one form or another of the RCAF to make inflation adjustments related to merger conditions is without merit. Section 10708 merely requires us to calculate and publish two indices, an RCAF-U and an RCAF-A index. That section does not require us to use that index for any particular statutory or regulatory purpose, much less does it prescribe limits to our merger conditioning power.⁴⁰ Thus, we reject the assertion that we are not permitted to use any measure other than RCAF-A as an adjustment mechanism for rail rates and charges.

OHIO RAIL DEVELOPMENT COMMISSION (ORDC) has filed a letter petition requesting that we extend the single to joint-line relief originating in the NITL agreement to Class II railroads in addition to Class III railroads. We extended these protections to Class III railroads in furtherance of our general policy of giving these small railroads the same measure of protection in merger cases as the shippers that they serve. We see no reason to extend this level of protection to Class II railroads, which tend to be larger, and do not tend to be so strictly identified with a very small number of shippers on their lines.

WISCONSIN CENTRAL LTD. (WCL), supported by I&M Rail Link, LLC, Four City Consortium, and Prairie Group, asks that we make publicly available certain information required in reporting element No. 11 of our monitoring conditions relating to the Chicago switching district. As we noted in *Decision No. 89*, 3 S.T.B. at 366-67, the purpose of our monitoring conditions is to generate information that will allow us to evaluate and respond to problems arising during implementation of this transaction, not to make all of the reporting information publicly available. We will place only reports filed pursuant to reporting elements 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, and 14, which are not considered to be commercially sensitive, in the public docket.

WCL argues, however, that the information in reporting element 11 that it seeks to make public is really no different from the public information reported in element 7 concerning shared assets areas (SAAs). We disagree. The SAAs are jointly owned areas served only by applicants and operated by Conrail as

³⁹ The NITL agreement itself expressly requires use of an RCAF-U adjustment for these interline rates.

⁴⁰ TFI does not argue that it was inappropriate as a matter of policy for us to impose as a condition a negotiated solution for shippers affected by the loss of single-line service that incorporates a temporary rate freeze with an RCAF-U adjustment. This condition clearly benefits TFI's members and is in the public interest.

their wholly owned subsidiary. Therefore, the operations within the SAAs are fully known to applicants, and not commercially sensitive.

The same cannot be said for the three Chicago area yards identified by WCL. Barr Yard is a wholly-owned CSX facility and Gibson and Blue Island yards are owned and operated by Indiana Harbor Belt Railroad (IHB). Therefore, the services provided by CSX and IHB affect all of the carriers (and ultimately, shippers) in the Chicago terminal area through reciprocal switching, trackage rights, intermediate switching, interchange and train classification. Clearly, the data relating to these operations include service provided to carriers other than applicants, which makes information about those operations even more commercially sensitive. Further, we agree with IHB that the monitoring and reporting requirements sought by WCL could jeopardize that carrier's ability to compete with the other carriers operating in the Chicago switching district.

Finally, WCL, as with any other carrier or shipper such as Prairie Group, can recognize service deficiencies based on its own experience, and without any need for reporting, and it always can inform us of any problems or service failures.⁴¹ WCL's request to modify our decision to make public this commercially sensitive data will be denied.

WHEELING & LAKE ERIE RAILWAY COMPANY (W&LE) (supported by Stark Development Board, Bayer, and ORDC) claims that our statement concerning the magnitude of transaction-related losses it risks is understated. In *Decision No. 89*, we said that the \$1.4 million revenue loss projected by applicants may be understated, and that the revenue loss is probably between \$1.4 and \$3.0 million, which we continue to believe is an accurate estimate. W&LE claims the number should really be \$4.2 to \$6.6 million. W&LE's petition is unusual in that it does not ask us to correct these supposed errors now, nor does it ask for us to impose any further relief. It merely asks for us to declare that we have understated the magnitude of its losses in aid of its ongoing negotiations with applicants concerning certain mutually beneficial arrangements that we ordered the parties to pursue in *Decision No. 89*. Meanwhile, it asks for us to stay any action on its petition.

In *Decision No. 89*, we recognized that the impact on W&LE might be substantial, and we accorded relief accordingly. Whether that traffic loss will be \$3.0 million, as we estimated, or \$4.2 million or more, as W&LE contends, makes no material difference. Our intention was not to indemnify W&LE

⁴¹ The Director of our Office of Compliance and Enforcement is authorized to make appropriate changes to or supplement the data requirements based on review of the information.

against these losses dollar for dollar. Rather, our intent was to give W&LE the opportunity to obtain additional traffic in aid of its ability to continue to be able to provide essential services. W&LE has not challenged our determination of how much relief should be required for that purpose. We do not believe that any purpose would be served by holding this petition in abeyance to permit a future determination of issues that are not material to the amount of relief we granted; accordingly we will deny it now.⁴²

STARK DEVELOPMENT BOARD (SDB) asserts that the relief we have granted to maintain the essential services provided by W&LE is insufficient, by itself, to protect SDB's interest in the Neomodal terminal, an intermodal terminal built with public funds and located on a W&LE line in Stark County, OH. SDB states that Neomodal was the only significant intermodal terminal in Northeast Ohio that provided CSX and NS the opportunity to compete with Conrail for that region's intermodal business, and that our approval of the transaction will directly result in severe operational and financial problems for Neomodal as CSX and NS prepare to implement plans to build competitive intermodal facilities at nearby locations.

Applicants state that, contrary to the impression left by SDB, our approval of the transaction will not result in the creation of any new intermodal terminals to serve Northeast Ohio, but will lead to improvements (and relocations) of existing facilities, which will benefit intermodal customers. And applicants note that SDB has offered no examples or explanations of how the transaction, as conditioned to ensure the continuation of the essential service provided by W&LE, will result in any lessening of competitive options for the region's shippers. Applicants point out that W&LE has not requested the extensive conditions sought by SDB. Finally, applicants assert that these conditions would, in essence, make CSX and NS responsible for the operating and financial success of Neomodal, which they characterize as a geographically disadvantaged facility⁴³ that has failed to meet financial expectations since it was completed and whose siting was a by-product of a track relocation project whose primary

⁴² Bayer's pleading indicates that CSX has claimed that it is not required to negotiate any agreement with W&LE concerning shippers in the New Martinsville, WV, area because any such agreement could not be beneficial to CSX. Without commenting on the mutually beneficial nature of any such agreement that might be discussed, the Board expects that CSX will pursue negotiations in good faith regarding this shipper and any other shipper along CSX's line between Benwood and Brooklyn Junction, WV.

⁴³ Applicants state that, solely as a result of its location on the W&LE tracks in Stark County, Neomodal suffers from increased transit times — a serious shortcoming for truck-competitive intermodal traffic — and from the absence of a large local market.

purpose was to induce a major Stark County employer to retain and expand its facility in the county.

The Board's role here is to protect competition, not competitors. We find that intermodal shippers in Northeast Ohio will benefit from the transaction, and that Neomodal will benefit from the conditions we have imposed to protect the essential service offered by W&LE. No additional conditions are necessary or warranted.

READING AND BLUE MOUNTAIN RAILROAD COMPANY (RBMN) asks us to "clarify" that shippers on Class III lines will be able to invoke the Class III carrier protections set forth in ordering paragraph 20 of *Decision 89*. As the text of the decision makes clear, *id.* 3 S.T.B. at 254-55, the Class III carrier at its option may invoke those protections. The reason we gave the Class III carriers this option is that it also would bind them, not just the applicants, to maintain existing rates and provide reasonable joint-line service. We were reluctant to impose the agreement among applicants and NITL on Class III carriers who were not parties to the agreement without their consent because we were concerned that this might have some adverse impact upon their ability to obtain adequate revenues. RBMN is free, as are all other Class III carriers, to use this condition for the benefit of its shippers if it so chooses. Accordingly, its request for clarification will be denied.⁴⁴

RBMN now claims for the first time that the blocking provisions in the contract under which it acquired its properties from Conrail were part of an allegedly nonassignable contract, the Lehigh Agreement. RBMN now claims that we erred in permitting applicants to override the nonassignability clauses contained in the Lehigh Agreement. This issue is not appropriate for reconsideration because it does not involve an allegation of material error, changed circumstances, or new evidence. The issue cannot be material error, since we never had occasion to rule on a request that the Lehigh Agreement be made an exception to applicants' request that all contracts would be valid and transferable regardless of nonassignability clauses. Accordingly, that clause in the Lehigh Agreement has been overridden. Further, this issue is not new evidence or changed circumstances. It is just a newly raised argument that could have been and should have been raised earlier.⁴⁵ Accordingly, the petition for reconsideration of this issue will be denied.

⁴⁴ We will grant, however, RBMN's request that we clarify that, regardless of what entity holds the Lehigh Agreement, applicants will be precluded from expanding the blocking provisions.

⁴⁵ Because we have ensured that the transaction will result in no expansion of the scope of such blocking provisions, RBMN will in no way be harmed by a transfer of the Lehigh Agreement to one of the applicants.

THE FOUR CITY CONSORTIUM (Four Cities) argues that we committed procedural and substantive errors in our environmental review process.⁴⁶ It seeks environmental mitigation conditions in addition to those we imposed for Four Cities in *Decision No. 89*.⁴⁷ Applicants replied (CSX/NS-217).

Four Cities renews its contention that we should not have considered any information submitted to SEA after February 2, 1998, the close of the comment period on the draft environmental impact statement (Draft EIS). Four Cities has not presented any new arguments that warrant a reversal of *Decision No. 83* (served May 27, 1998), where we previously rejected that argument, explaining that the environmental review process is a fluid and open one that encourages the broadest possible public participation. As the environmental review progresses, it is not unusual for an applicant to propose voluntary mitigation options and other changes to the applicant's original operating plan that can affect projected train traffic levels, and benefit the environment. SEA normally considers, and indeed encourages, such mitigative changes as part of its ongoing environmental analysis and recommendations.

Only where changes in a proposal under consideration could potentially adversely affect parties' rights (for example by increasing traffic) does SEA typically provide an opportunity for additional comment.⁴⁸ Here, however, the change about which Four Cities complains is that CSX revised its original operating plan in April 1998 to reroute trains *away from* the Four Cities area (the line (C-023) between Pine Junction and Barr Yard through East Chicago). This will benefit Four Cities by reducing the anticipated traffic-related increase in the number of trains operating over this line from approximately six trains per day to about two trains per day.⁴⁹

⁴⁶ Four Cities also supports the request of WCL to make public certain data reported to us concerning the Chicago switching district. We have already addressed WCL's request.

⁴⁷ We imposed environmental mitigation for the Four Cities area addressing grade crossing traffic delay and safety concerns. See, Environmental Condition No. 21.

⁴⁸ For example, SEA provided an additional comment period in the Final Environmental Impact Statement (Final EIS) for parties affected by NS' proposed train traffic changes in the greater Cleveland area that could result in potential train traffic increases in Ohio and Pennsylvania.

⁴⁹ Nor was this new plan material to our decision concerning the appropriate amount of environmental mitigation in the Four Cities area. The Draft EIS evaluated the impacts on the Pine Junction/Barr Yard segment based on the originally projected 5.7 train-per-day increase on the segment and concluded that this level of traffic increases would not itself warrant any mitigation. In the Final EIS, SEA recommended mitigation for Four Cities based on certain unique local circumstances of those communities, not because of the level of traffic increases. Neither a 5.7 nor a 2 train-per-day increase is large when compared to the 30 trains per day that currently go through the area.

Furthermore, Four Cities, like every other party, had an opportunity to raise any concerns about the adequacy of SEA's environmental review, and the adequacy of the environmental conditions recommended in the Final EIS that we have adopted and imposed. After public issuance of the Final EIS, Four Cities participated in the June 3-4, 1998 oral argument. Moreover, throughout the environmental review process and in *Decision No. 89*, we have advised all parties of the opportunity to bring any concerns about the Final EIS (including any environmental conditions) to our attention through an administrative appeal of our final written decision. Thus, there is no merit to Four Cities' contention that no opportunity was afforded for it to respond to matters presented for the first time in the Final EIS.

Four Cities urges us to clarify and require that applicants must adhere to their representations regarding the precise level of post-transaction train traffic in the Four Cities area. But Four Cities has not shown a need for that extraordinary relief.⁵⁰ As applicants correctly note, traffic projections made by a merger applicant must be based on good faith traffic projections of the traffic patterns that will follow consummation of an acquisition. In this case, we reviewed applicants' operating plans and revisions and found them to be good faith projections of anticipated train traffic levels. Neither Four Cities nor any other party has shown that applicants' traffic projections for the Four Cities area are misleading or unfounded.

Moreover, while railroads do their best to predict the amount of post-transaction traffic likely to move over a given line, railroads need flexibility because the amount of traffic that actually moves over a particular line depends upon shipper demand. Indeed, a traffic cap could well interfere with applicants' ability to carry out their statutory obligation to provide common carrier service upon reasonable request. Therefore, neither we nor the ICC has imposed permanent caps on the number of trains the railroads can operate or specified that existing freight must be transported by a specific route.⁵¹ Rather, as SEA

⁵⁰ While we will not impose the specific environmental mitigation Four Cities seeks, our mitigation addresses its concerns. In Environmental Condition No. 21(f), we imposed mitigation requiring CSX to reroute traffic as much as practicable from the line segment between Pine Junction and Barr Yard. In addition, as agreed to by CSX, we have required CSX (1) to instruct its crews not to stop trains so as to block major crossings on the Pine Junction/Barr Yard segment, as practicable and consistent with safe operating practices, and (2) to work with Four Cities to coordinate train movements and emergency response. Environmental Condition No. 21(j) provides a forum for Four Cities to meet regularly with applicants to assess local traffic delay and other issues.

⁵¹ In *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996), we imposed a temporary rail traffic limit in Reno, NV, and Wichita, KS, for 18 months for the sole purpose of allowing the
(continued...)

explained in the Final EIS (Vol. 3, at 5-69 to 5-71), railroads must be permitted to decide on a continuous and ongoing basis which routes are most efficient to meet their customers' needs.

In any event, Four Cities is not without recourse if there should be a material change from the post-transaction projections upon which we relied in formulating mitigation. Environmental Condition No. 50 permits us to reexamine the mitigation issue, if warranted, under those circumstances.

Four Cities also maintains that we erred in our conclusion that the transaction would not cause disproportionately high and adverse impacts on minority or low-income residents on two line segments in the Four Cities area, between Tolleston and Clark Junction (C-024) and between Warsaw and Tolleston Junction (C-026). Four Cities correctly points out that these two line segments were identified in the Draft EIS as meeting the threshold for further environmental justice analysis based on the demographics of the population in the relevant area.⁵² The Draft EIS, however, did not make any determination whether the transaction-related impacts from the projected operations on line segments C-026 and C-024 were disproportionately high and adverse and therefore could warrant additional mitigation. That analysis was left to the Final EIS.

After issuance of the Draft EIS, SEA conducted additional analysis of those segments. It first assessed the magnitude of the impacts, and then determined whether the minority and/or low-income populations on those line segments with "high" impacts — those exceeding SEA's thresholds for noise, hazardous materials transport, and highway/rail at-grade crossing safety and delay — would be disproportionately affected.⁵³ In the Final EIS, SEA discussed its methodology for determining whether there would be disproportionate impacts for rail line segments by county or region.⁵⁴ SEA determined that there would be an increase in noise impacts along line segments C-026 and C-024, but that

⁵¹(...continued)

completion of environmental mitigation studies. This 18-month period was a stay to permit determination of appropriate local mitigation measures for these communities, not an exercise of continuing regulatory control over the level of traffic on particular lines.

⁵² SEA determined that further analysis was warranted where 50% or more of the residents in a geographic area surrounding a line segment were defined as low-income or minority, or the percentage of low-income or minority residents was at least 10% greater than that of the surrounding county. See, Draft EIS, Vol. 5A, Appendix K, Table K-15, at K-22 to K-23.

⁵³ SEA considered impacts to be disproportionate if they would be predominately borne by minority or low-income populations or would be more severe or greater in magnitude. We agree with this approach.

⁵⁴ See, Final EIS, Vol. 6C, Appendix M, Section M.2.4.

the total projected environmental impacts on the minority and/or low-income populations along those line segments were not disproportionately high and adverse. Therefore, SEA determined, and we agree, that the impacts would not be more severe or greater in magnitude when compared to other populations, and that no tailored environmental justice mitigation was warranted.⁵⁵

Four Cities has not presented any evidence or argument suggesting that our environmental justice analysis is incomplete or incorrect. There is no merit to Four Cities' suggestion that we should stay implementation of the CSX operating plan on line segments C-026 and C-024 pending completion of further environmental justice analysis. As discussed above, we have already completed that analysis, and, contrary to Four Cities' assertions, there is no inconsistency between the Draft and Final EIS.⁵⁶

Finally, Four Cities asks that we modify our decision to make public the confidential weekly reports that applicants will submit to us on Chicago Gateway Operations and on major yards and terminals (including Barr Yard) pursuant to Operational Monitoring Requirements 10 and 11.⁵⁷ We agree with applicants that it would be inappropriate to require the disclosure of this commercially sensitive information, which is being submitted to our Office of Compliance and Enforcement on a confidential basis,⁵⁸ to Four Cities or any other party. With respect to FCC's concerns that Operational Monitoring Requirement 10 is insufficient because it appears not to include all traffic data, based on the Board's use of the term "run through" trains instead of "through" trains, we did not intend such a distinction. Requirement 10 is intended to establish a measurement of the on-time performance of applicants' trains moving to connecting carriers through the Chicago Gateway. For our monitoring

⁵⁵ The increase in train traffic is only projected to be 4-5 trains per day, while the projected increases in traffic on line segments found to warrant focused mitigation for the unique needs of certain environmental justice communities ranged from 17 to 40 trains. In any event, our final mitigation addresses all communities and populations along line segments C-024 and C-026 likely to experience significant environmental impacts. For example, SEA determined that the noise levels on segment C-026 met its mitigation thresholds and recommended mitigation for three receptors. See, Environmental Condition No. 11. No noise mitigation was recommended for segment C-024 because SEA's analysis did not identify any receptors within its 70 decibel noise mitigation thresholds. SEA also found mitigation for train horn sounding at crossings along line segment C-024 unwarranted.

⁵⁶ Moreover, Four Cities did not comport with our regulations by requesting a stay 10 days before the effective date of our decision; nor has it even attempted to meet the criteria for a stay. See, 49 CFR 1115.3(f).

⁵⁷ The monthly status reports on construction and other capital projects required of applicants already are made public.

⁵⁸ See, *Decision No. 89*, 3 S.T.B. at 370-71 (Requirement 15).

purposes, we clarify that we define "through" and "run through" trains as expedited movements from origin to destination, which would generally be pre-blocked and would not require classification at Chicago. Instead, these trains would move directly to a connecting line haul center. And in response to Four Cities' request for additional monthly reporting for the line segments in the Four Cities area (C-023, C-024, C-026 and N-469), we will modify Environmental Condition No. 21(i), which requires applicants to conduct regularly scheduled meetings with representatives of Four Cities for 3 years. Our revised condition will require applicants at those meetings to provide a status report on average train traffic volumes and speeds on the applicable portions of the four rail line segments in the area and on the progress of operational and capital improvements required by us to address highway/rail at-grade crossing safety and delay issues in the Four Cities area.⁵⁹

THE NEW JERSEY DEPARTMENT OF TRANSPORTATION/NEW JERSEY TRANSIT COMMISSION (NJT) asks us to modify our hazardous materials transport condition (Environmental Condition No. 4(A)) for line segments between Ridgewood Junction, NJ, and Suffern, NY (designated as N-064), and between Croxton, NJ, and Ridgewood Junction (N-050). It believes that these segments should have been classified as "key routes." Applicants do not object to NJT's request, and we will grant it. The latest hazardous material transport information supplied by applicants shows that those line segments will become key routes warranting hazardous materials key route mitigation.

NJT also filed a letter asserting that our description in *Decision No. 89* of certain lines being transferred from Conrail to CSX and NS was inaccurate. These descriptions are based upon descriptions presented by applicants in their original application, and, as applicants point out, NJT has never presented any evidence that these descriptions are wrong. Moreover, these descriptions are of no particular legal importance because we cannot authorize Conrail to transfer property it does not own. NJT should be reassured that whatever ownership rights it may have in any of these lines through deed or contract is unaffected by our decision. We need not settle these ownership issues, which turn on contract interpretation, not upon our grant of authority approving this transaction.

LIVONIA, AVON, AND LAKEVILLE RAILROAD CORPORATION (LAL) has by letter raised similar line description issues to those raised by NJT.⁶⁰ No

⁵⁹ Prairie Group and I&M supported Four Cities' request for modification of the operational monitoring condition, as discussed in the appendix.

⁶⁰ It is unclear whether applicants were served with this pleading, to which they have not replied.

change in our decision is needed in response to this issue for the same reasons as noted with regard to NJT.

CITIZENS GAS AND COKE UTILITY (CG&C) wants us to incorporate the terms of a settlement agreement that it entered with CSX on June 3, 1998, into a formal merger condition. Neither the Settlement Agreement (under seal) nor a description of its essential points has been provided to us. Thus, there is no basis for us to find that it would be appropriate to incorporate this agreement in a merger condition. If CG&C submits the agreement to us, we will determine in a latter decision whether it would be appropriate for inclusion as a merger condition.

The action taken in this decision, as conditioned by the environmental mitigation conditions set forth in Appendix B, will not result in any significant adverse impacts either to the quality of the human environment or to the conservation of energy resources.

It is ordered:

1. *Decision No. 89* is clarified to the extent, and in the manner, indicated in this decision.

2. Applicants must comply with the environmental mitigation conditions set forth in Appendix B.

3. The CSX/NS-209 petition for clarification or reconsideration is granted in part and denied in part, as indicated in this decision. The Wyandot/NL&S ordering paragraph (*Decision No. 89*, 3 S.T.B. at 390, ordering paragraph 43) is revised to read as follows: "As respects Wyandot and NL&S, CSX and NS: must adhere to their offer to provide single-line service for all existing movements of aggregates, provided they are tendered in unit-trains or blocks of 40 or more cars; and in other circumstances including new movements, for shipments moving at least 75 miles, must arrange run-through operations (for shipments of 60 cars or more) and pre-blocking arrangements (for shipments of 10 to 60 cars). The requirements imposed on CSX and NS under the preceding sentence will expire at the end of the 5-year period commencing on Day One."

4. The CSX-160 petition for clarification is granted, with the understanding that CSXI will agree to be bound, jointly and severally with CSXT, to the performance of the Conrail contract (with respect to those origination/destination pairs/routes as may be allocated to CSXT under the processes of Section 2.2(c) of the Transaction Agreement) as fully as CSXT will be bound.

5. The APL-27 petition is granted insofar as APL has asked that we clarify that the time period referenced in *Decision No. 89*, 3 S.T.B. at 386-87, ordering paragraph 10 (and throughout *Decision No. 89*) is 180 days, not 6 months, and is otherwise denied.

3 S.T.B.

6. The application filed by the Nadler Delegation is denied.
7. The motion filed by Ms. Zee Frank is denied, and the appeal filed by Ms. Zee Frank is rejected.
8. The IP&L-15 petition for clarification or reconsideration is granted in part and denied in part, as indicated in this decision. In *Decision No. 89*, the second sentence of footnote 151 (*Decision No. 89*, 3 S.T.B. at 295 n.151) is revised to read as follows: "As explained below in the section entitled Indianapolis Power and Light, the condition we are imposing on traffic to IP&L's Stout plant will result in availability of direct NS service free of CSX and/or INRD switching charges." CSX, NS, ISRR, and IP&L should attempt to negotiate a mutually satisfactory solution respecting any MP 6.0 interchange problems (and respecting any related problems that may be necessarily incidental to a MP 6.0 interchange problem), and should advise us, no later than December 18, 1998, of the status of their negotiations.
9. The TFI-8 petition for clarification or reconsideration is denied.
10. The clarification request embraced in ORDC's July 29th letter is denied.
11. The WC-19 petition for partial reconsideration of monitoring and reporting conditions is denied.
12. The WLE-9 reconsideration/clarification petition is denied.
13. The SDB-15 petition for reconsideration is denied.
14. The RBMN-10 petition to reopen and to clarify is denied insofar as that petition raises issues concerning the NITL agreement's Section III(E) and the Lehigh Agreement's antiassignment clause. The RBMN-10 petition to reopen and to clarify is granted insofar as that petition raises an issue concerning the Lehigh Agreement's blocking provision (ordering paragraph 39).
15. The FCC-18 petition for reconsideration is granted in part and denied in part, as indicated in this decision.
16. The requests embraced in NJT's August 12th letter are granted in part and denied in part, as indicated in this decision.
17. The request embraced in LAL's August 4th letter is denied.
18. CG&C's July 22nd request to withdraw comments in opposition "on condition that the Board order that approval of the Joint Application by the Board is subject to the terms of a Settlement Agreement entered into June 3, 1998, between Citizens Gas & Coke Utility and CSX" is denied. CG&C, however, may renew its July 22nd request, provided that CG&C submits, along with a renewed request, a copy of the CG&C/CSX settlement agreement.
19. This decision shall be effective on October 19, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

APPENDIX A: SUMMARY OF PLEADINGS

THE CSX/NS-209 PETITION. CSX and/or NS seek reconsideration of three conditions imposed in *Decision No. 89*.

Relief Sought By CSX and/or NS. CSX and/or NS have advanced several arguments in support of the relief sought vis-à-vis Environmental Condition 11, Environmental Condition 26(c), and the Wyandot/NL&S condition.

(1) *Environmental Condition 11 (In General).* CSX and NS request clarification that Environmental Condition 11, *see, Decision No. 89*, 3 S.T.B. at 588-90, does not require them to reduce railroad noise levels below pre-existing levels. CSX and NS contend: that, although Environmental Condition 11 provides that the design goal for noise mitigation shall be a 10-decibel (dBA) noise reduction, most of the receptors identified as warranting mitigation are only projected to experience an increase of noise in the range of 5-10 dBA; that conditions should be narrowly tailored to remedy only adverse effects of the CSX/NS/CR transaction itself, and not pre-existing conditions not related to the CSX/NS/CR transaction; and that, therefore, we should clarify that the design goal for any line segment should be either 10 dBA or the projected increase in noise for that line segment as a result of the CSX/NS/CR transaction, whichever is less.

(1a) *Environmental Condition 11 (Toledo-Deshler Line Segment).* On the Toledo, OH-Deshler, OH line segment, 77 receptors have been identified as meeting the wayside noise mitigation criteria. *See, Decision No. 89*, 3 S.T.B. at 589 (Rail Line Segment ID C-065). CSX contends: that it resumed mainline traffic on this line segment in May 1997 independent of the CSX/NS/CR transaction; that there will be no further increase in traffic on this line segment as a result of the CSX/NS/CR transaction; and that, therefore, we erred in requiring CSX to mitigate noise on this line segment. CSX apparently seeks reconsideration of Environmental Condition 11 as respects the Toledo-Deshler line segment. *See, CSX/NS-209* at 6 n.3 (CSX does not explicitly seek reconsideration; but CSX's claim that the conclusion respecting the Toledo-Deshler line segment "is erroneous" is best understood as an implicit request for reconsideration).

(2) *Environmental Condition 26(C).* CSX requests amendment of Environmental Condition 26(C), *see, Decision No. 89*, 3 S.T.B. at 595-96, with respect to the location of the Wheel Impact Load Detectors (WILDs) required to be installed on the CSX line west and east of Cleveland. CSX contends: that the optimal location for the western WILD is likely farther west than Olmsted Falls, OH; that the appropriate location for the eastern WILD is at West Springfield, PA; and that, because the installation of WILDs was recommended for the first time in the Final Environmental Impact Statement (Final EIS), CSX did not have, prior to the issuance of the Final EIS, an opportunity to submit, to the Board's Section of Environmental Analysis (SEA), information respecting the engineering and operational criteria for siting WILDs. *See also, CSX/NS-209*, V.S. Carter (new evidence respecting WILDs). CSX therefore asks that Environmental Condition 26(C) be modified: (1) to defer the determination of the location of the western WILD until CSX has had the opportunity to present to the Board a recommendation based on a detailed evaluation of the relevant engineering and operating criteria; and (2) to replace installation of a new eastern WILD within 20 miles to the east of Cleveland with maintenance of the existing Conrail WILD at West Springfield, PA.

(3) *Wyandot/NL&S Condition.* CSX and NS urge clarification of the condition that was imposed for the benefit of two Ohio SL-to-JL⁶¹ aggregates shippers, Wyandot Dolomite, Inc.

⁶¹ An "SL-to-JL" shipper is a shipper whose pre-transaction Conrail single-line route will be replaced by a post-transaction CSX-NS joint-line route. Applicants refer to such shippers as "one-to- (continued...)"

(Wyandot) and National Lime and Stone Company (NL&S). See, *Decision No. 89*, 3 S.T.B. at 311-13. See also, *Decision No. 89*, 3 S.T.B. at 390 (ordering paragraph 43). CSX and NS contend that this condition should be understood to involve transitional and temporary measures, like the settlement proposal from which this condition was extrapolated⁶² and like the SL-to-JL provisions in the NITL agreement.⁶³ CSX and NS specifically request that we clarify or otherwise provide that the intention is that this condition will remain in effect only during the 5-year period beginning on the Split Date.

The CLEV-21 Reply. As respects Environmental Condition 26(C), the City of Cleveland agrees that CSX should be allowed to use its expertise to determine the appropriate location for the western WILD and that CSX should be allowed to rely on the existing eastern WILD at West Springfield, PA, provided, however: that the western WILD must be located within 60 miles of the City (i.e., no further away than Greenwich, OH); and that, where there are double tracks over which trains can be operated in both directions, a WILD, or any of the other devices required to provide an early warning ring around the City, must be placed on both tracks.

The WYANDOT-7 Reply. Wyandot contends that, even though we should have imposed the conditions it sought⁶⁴ and even though the Wyandot/NL&S condition we did impose⁶⁵ is not likely to work,⁶⁶ Wyandot has chosen to take a "wait and see" approach to the CSX/NS/CR transaction and has not sought reconsideration of *Decision No. 89*. Wyandot further contends: that the Wyandot/NL&S condition is clearly worded and properly reflects our specific intention to impose a condition broader in scope and more lasting in duration than the condition that had been "proffered" by applicants; that, because we recognized that the harms the Wyandot/NL&S condition were intended to address would not be transitory, we did not impose a time limitation upon that condition; and that a time limitation of the sort urged by applicants would make the Wyandot/NL&S condition entirely ineffective. Wyandot therefore urges denial of the Wyandot/NL&S component of the CSX/NS-209 petition.

The NLS-10 Response. NL&S contends: that we erred in rejecting the conditions it sought,⁶⁷ that the Wyandot/NL&S condition we imposed will alleviate only a small portion of the harms NL&S expects to experience; that imposition of the time limit sought by applicants would magnify the inadequacy of the Wyandot/NL&S condition; that the Wyandot/NL&S condition should therefore stay in effect for at least 5 years; and that, at the end of that initial 5-year period, the Wyandot/NL&S condition should remain in effect, unless and until applicants obtain permission from the Board to

⁶¹(...continued)

two" shippers. See, e.g., CSX/NS-209 at 3. We refer to such shippers as "SL-to-JL" shippers. See, e.g., *Decision No. 89*, 3 S.T.B. at 451 n.406 (explaining that we have accorded a different meaning to the "1-to-2" concept; we regard a "1-to-2" shipper as a shipper that presently has access to a single railroad but that will have, post-transaction, access to two railroads).

⁶² See, *Decision No. 89*, 3 S.T.B. at 313 n.172. See also, CSX/NS-209 at 13.

⁶³ The NITL agreement is the settlement agreement that CSX and NS entered into with The National Industrial Transportation League (NITL). See *Decision No. 89*, 3 S.T.B. at 251-57 and 449-51. See, especially, *Decision No. 89*, 3 S.T.B. at 254-55 and 451 (discussion of the NITL agreement's SL-to-JL provisions, under the heading "Interline Service").

⁶⁴ See, *Decision No. 89*, 3 S.T.B. at 492-93.

⁶⁵ See, *Decision No. 89*, 3 S.T.B. at 390 (ordering paragraph 43).

⁶⁶ Wyandot insists that joint-line rail transport for aggregates, especially at the relatively short distances involved, is uneconomical and impractical.

⁶⁷ See, *Decision No. 89*, 3 S.T.B. at 488-89.

abandon service to NL&S. NL&S therefore urges denial of the Wyandot/NL&S component of the CSX/NS-209 petition.

ORDC's September 1st Letter Respecting CSX/NS-209. ORDC, which urges denial of the Wyandot/NL&S component of the CSX/NS-209 petition, contends that, unless the single-line routes that Wyandot and NL&S enjoyed pre-transaction are preserved, these companies will suffer considerable and permanent injuries; there is nothing in the record, ORDC claims, to establish that these injuries will abate over time. ORDC therefore insists that we should, at the very least, preserve the scope of the relief that was awarded to Wyandot and NL&S in *Decision No. 89*.

THE CSX-160 PETITION. CSX seeks clarification of *Decision Nos. 87 and 89* with respect to its right to share confidential information in the APL/Conrail contract and information contained in or touching or concerning that contract.⁶⁸ See, *Decision No. 87*, wherein we modified the previously issued protective order to provide: that, on and after June 11, 1998, Conrail could share with CSX and NS information regarding transportation contracts to which Conrail was a party; that, however, until August 22, 1998, such information could be shared solely for certain specified purposes; and that, for the protection of APL and its subsidiaries, "disclosure protection satisfactory to APL shall be provided by applicants so that neither contracts of Conrail with APL, nor any confidential information contained in or touching or concerning such contracts shall be made available" to CSX Intermodal, Inc. (CSXI, a stacktrain affiliate of CSXT) or Sea-Land Service, Inc. (Sea-Land, an ocean carrier affiliate of CSXT), or any of the subsidiaries, officers, or employees of CSXI or Sea-Land.⁶⁹ See also, *Decision No. 89*, 3 S.T.B. at 316: "[T]he confidentiality provisions that we have imposed should prevent any access by CSX's water and intermodal affiliates to confidential contract information about APL." See also, *Decision No. 89*, 3 S.T.B. at 387 (ordering paragraph 16; applicants must comply with all of the conditions imposed in *Decision No. 89*, whether or not such conditions are specifically referenced in the ordering paragraphs).

Relief Sought By CSX. CSX contends: that CSXI is the entity within the CSX corporate family that is responsible for marketing and administering the transportation of intermodal traffic transported by CSXT; that, indeed, CSXI is the entity with which APL officials have on numerous occasions discussed implementation of the CSX/NS/CR transaction relative to APL traffic; and that any continued (*i.e.*, post-Control Date) restriction on the ability of CSXI officials to review the APL/Conrail contract would require the making of special, and less efficient, arrangements respecting the transportation of APL intermodal traffic transported by CSXT (arrangements, CSX notes, that would be applicable with respect to only one intermodal user: APL). CSX concedes that it would be possible to make such arrangements (which would require CSXT officials, whose regular responsibilities do not embrace intermodal traffic, to act in lieu of CSXI officials, whose regular responsibilities do embrace such traffic). CSX claims, however: that such arrangements would be inconsistent with CSX's normal business practices, and would require needlessly prolonged and

⁶⁸ See, *Decision No. 89*, 3 S.T.B. at 480-83 (discussion of the APL/Conrail contract, which is sometimes referred to as a transportation services agreement or TSA). Although the record contains several references to multiple APL/Conrail "contracts," see, e.g., CSX-160 at 8 n.11, there appears to be only one APL/Conrail contract, see, e.g., APL-27 at 1 (reference to "the existing [APL/Conrail] rail transportation contract").

⁶⁹ See, *Decision No. 89*, 3 S.T.B. at 480 (APL claims that it competes head-to-head with Sea-Land and CSXI as respects the transportation of time-sensitive commodities from points in Asia and the Pacific Rim to points in the Eastern United States; APL further claims that it competes head-to-head with CSXI in every major transportation corridor within the United States).

complicated CSX/APL discussions; that, in any event, such arrangements would serve no legitimate purpose;⁷⁰ and that, under *Decision Nos. 87 and 89*, such arrangements are simply not required.⁷¹

CSX acknowledges that, during the course of this proceeding, it represented that it would be willing to place restrictions on access to the APL/Conrail contract by CSX's ocean carrier affiliates (i.e., Sea-Land and its ocean carrier subsidiaries). And, CSX adds, it understands that it must adhere to the representations it made during the course of this proceeding. See, *Decision No. 89*, 3 S.T.B. at 387 (ordering paragraph 19).⁷² Insisting, however, that it never made any such representation with respect to CSXI, CSX asks that we affirm that, on and after August 22, 1998, it can share with CSXI confidential information in the APL/Conrail contract, and information contained in or touching or concerning that contract.⁷³ CSX adds that, to remove any concerns APL might have, CSX is willing to accept a condition that would provide that, from and after the Control Date, CSXI "shall not use confidential information contained in or relating to the Conrail contracts with APL for any purposes other than placing information about such contracts in its information systems, testing such systems, planning and preparation of operations under the contracts, and the performance of the contracts, and not for any other business, commercial or competitive purposes."⁷⁴ CSX-160 at 10.

The APL-28 Response. APL contends that we should either deny the CSX-160 clarification request or condition CSXI's access to the TSA on CSXI becoming a signatory to the TSA.

(j) *The CSX-160 Clarification Request Should Be Denied.* APL insists that, in order to protect APL from the harms that would occur if its direct competitors (Sea-Land and CSXI) were accorded access to APL's confidential commercial information, we had in mind, in *Decision No. 89*, that the protections we had ordered in *Decision No. 87* would be carried forward past the Control Date, and would (unless the parties agreed otherwise) endure until the expiration of the TSA.⁷⁴ APL therefore contends: that *Decision No. 89* bars CSX from sharing with CSXI confidential information in the

⁷⁰ CSX cites our determination that APL's discrimination concerns do not warrant the imposition of any conditions. See, *Decision No. 89*, 3 S.T.B. at 315-16.

⁷¹ CSX argues, in essence: that the relevant restrictions contained in the protective order were not intended to survive past the Control Date; that the restrictions provided for in *Decision No. 87* were not intended to survive past the Control Date either; and that, although the conditions provided for in *Decision No. 89* were intended to survive past the Control Date, the fact of the matter is that we did not impose, in *Decision No. 89*, any condition restricting access by CSXI to Conrail contract information. CSX concedes that we remarked, in *Decision No. 89* (3 S.T.B. at 316, citing *Decision No. 87*, emphasis added), that "the confidentiality provisions that we have imposed should prevent any access by CSX's water and intermodal affiliates to confidential contract information about APL." CSX contends, however, that this remark should not be interpreted "as imposing any new or different disclosure obligations beyond those imposed by the Protective Order, as amended by *Decision No. 87*." CSX-160 at 7.

⁷² CSX indicates that it is prepared to maintain the confidentiality of APL/Conrail information as respects Sea-Land, and Sea-Land's subsidiaries, officers, or employees as well. The terms suggested by CSX would provide that "[n]o confidential information contained in or touching the APL/Conrail contracts shall at any time be made available to Sea-Land Service, Inc., or any of its subsidiaries, officers or employees." See, CSX-160 at 8 n.11.

⁷³ CSX claims that nothing in the CSX/APL agreement implementing "disclosure protection satisfactory to APL," *Decision No. 87*, at 3, bars post-Control Date disclosure to CSXI of APL/Conrail contract information. See, CSX-160 at 3 n.2.

⁷⁴ APL cites *Decision No. 89*, 3 S.T.B. at 316 (emphasis added): "[T]he confidentiality provisions that we have imposed should prevent any access by CSX's water and intermodal affiliates to confidential contract information about APL. See, *Decision No. 87* in this proceeding."

APL/Conrail contract, and information contained in or touching or concerning that contract; and that, because the “clarification” sought in the CSX-160 petition is at odds with the language and intent of *Decision No. 89*, the CSX-160 clarification request should be denied.

(ii) *CSXI’s Access To The TSA Should Be Conditioned On CSXI Becoming A Signatory To The TSA*. APL insists that, if we do not deny the CSX-160 petition, we must, at the very least, order CSX to require CSXI to become a party to the TSA (inclusive of all supplements and addendums) before obtaining access to the TSA.⁷⁵ APL contends: that, because CSXI will administer the TSA operationally and functionally while CSXT will simply perform the underlying rail service, it is necessary that CSXI be bound by all of the terms of the TSA; that, if CSXI is to receive the benefits of the TSA, it should also accept the responsibilities and obligations which Conrail currently has under the TSA; and that it is important that CSXI be a party to the TSA so that, if APL sees any actions by CSXI that violate either the TSA or the standards to which CSXI has committed, APL will be able to bring such actions to our attention, and to take any other steps necessary to protect itself.⁷⁶

CSX’s September 3rd Letter. CSX indicates that it is willing to provide that, if we grant the CSX-160 petition, CSXI will agree to be bound, jointly and severally with CSXT, to the performance of the Conrail contract (with respect to those origination/destination pairs/routes as may be allocated to CSXT under the processes of Section 2.2(c) of the Transaction Agreement) as fully as CSXT will be bound. CSX adds that this joint and several obligation will include all obligations and undertakings of Conrail in the contract, limited, however, to the origination/destination pairs/routes that are allocated to CSXT.⁷⁷

THE APL-27 PETITION. APL asks that we clarify the effect that *Decision No. 89* will have on the APL/Conrail contract⁷⁸ after the last day of the 180-day period beginning on Day 1.⁷⁹ See,

⁷⁵ APL notes that its APL-28 response is premised upon its understanding that, under Section 2.2(c) of the Transaction Agreement, CSXT will become, and remain, a party to the TSA, no matter what decision we make with respect to the CSX-160 petition. See, APL-28 at 1 n.2.

⁷⁶ As respects “the standards to which [CSXI] has committed,” APL-28 at 7, APL indicates that, if we decide that CSXI must have access to the TSA and the right to administer the TSA with respect to the traffic to be allocated to CSXT under Section 2.2(c), APL will accept CSXI’s representations that CSXI will not disadvantage APL through the use of the confidential information contained in the TSA, provided, however, that we require CSXI to become a party to the TSA. See, CSX-160, V.S. Passa at 3 (“[w]e are prepared to stipulate that on and after the Control Date, CSX Intermodal will not use any confidential information in the APL/Conrail contract for any purpose other than placing information about such contract in its information systems, testing such systems, planning and preparation of operations under the contract, and the performance of the contract, and not for any other business, commercial or competitive purposes”). See also, CSX-159 (filed August 10, 1998), V.S. Passa at 2 (“Our goal is to develop a solid business relationship built on the provision of excellent service to APL, and to be responsive to its operational and other requirements.”). APL adds that it expects that CSXI, as a party to the TSA, will be able to negotiate those changes or modifications which can be negotiated under the TSA regarding rates, service, or other terms. See, APL-28 at 7.

⁷⁷ CSX also adds that it assumes that physical reexecution of the Conrail contract will not be required.

⁷⁸ See, *Decision No. 89*, 3 S.T.B. at 480-83 (discussion of the APL/Conrail contract). See also, APL-27 at 12 (the APL/Conrail contract has created a network of rail service between 15 points: Chicago, IL, Boston, MA, Springfield, MA, Worcester, MA, Cleveland, OH, Columbus, OH, Toledo, OH, Baltimore, MD, Allentown, PA, Pittsburgh, PA, Morrisville, PA, Harrisburg, PA, St. Louis, (continued...))

Decision No. 89, 3 S.T.B. at 387 (the second sentence of ordering paragraph 10; as respects any CRC transportation contract in effect as of Day One that contains an antiassignment or other similar clause; at the end of the 180-day period beginning on Day One, a shipper with such a contract may elect either (a) to continue the contract until the expiration thereof under the same terms with the same carrier that has provided service during the 180-day period, or (b) to exercise whatever termination rights exist under the contract, provided the shipper gives 30 days' written notice to the serving carrier). See also, *Decision No. 89*, 3 S.T.B. at 213 n.27 (similar statement). See also, *Decision No. 89*, 3 S.T.B. at 272 and 315 (similar statements).⁸⁰

Relief Sought By APL. APL admits, in essence, that *Decision No. 89* (and, in particular, the second sentence of ordering paragraph 10, see, *Decision No. 89*, 3 S.T.B. at 387) can be read as providing that, at the end of the 180-day period beginning on Day One, APL may exercise whatever termination rights it has under the APL/Conrail contract.⁸¹ APL, however, suspects that, if it exercises its termination rights under the APL/Conrail contract, CSX, to which APINY has been allocated, will most likely exercise its own termination rights under the APL/Conrail lease.⁸² APL

⁷⁸(...continued)

MO, Syracuse, NY, and South Kearny, NJ). See also, *Decision No. 89*, 3 S.T.B. at 480 n.466 (APL notes: that South Kearny is the major Conrail intermodal yard in Northern New Jersey; that Conrail serves APL from South Kearny; that Conrail leases a portion of South Kearny to APL for APL's exclusive use; and that this portion is variously referred to as the APL Terminal and APINY). See also, APL-27 at 2 (under the APL/Conrail lease, APL pays \$1 a year rental for APINY). See also, *Decision Nos. 78, 84, 87, 90, and 91* (respecting other aspects of the APL/CSX controversy).

⁷⁹ The last day of that 180-day period will hereinafter be referred to as Day 180. The first day after Day 180 will hereinafter be referred to as Day 181.

⁸⁰ APL believes that the requirement that the shipper must give 30 days' written notice to the serving carrier means that such notice can be given on Day 150 (i.e., on the 150th day of the 180-day period beginning on Day One). See, APL-27 at 12-13.

⁸¹ This, of course, is a reading that APL does not favor. See, APL-27 at 3 n.8 (APL's analysis of ordering paragraphs 1, 8, and 10; APL notes that the approval of the CSX/NS/CR application in ordering paragraph 1 is "subject to the imposition of the conditions discussed in this decision"; APL also notes that NYC and PRR have the rights described in ordering paragraph 8, and that CSXT and NSR have, with respect to CRC's existing transportation contracts, the rights described in the first sentence of ordering paragraph 10, "[e]xcept as otherwise provided in this decision"; and APL apparently concludes that the rule stated in the second sentence of ordering paragraph 10 is somehow affected by the "subject to" phrase in ordering paragraph 1 and the "[e]xcept as otherwise provided" phrase in ordering paragraph 8 and in the first sentence of ordering paragraph 10).

⁸² APL indicates that the lease will terminate 90 days after the termination of the contract either by the lessor or by the lessee. See, APL-27 at 2 n.6. We will assume, for present purposes, that, as APL has indicated, the contract and the lease are linked in that, pursuant to the terms of the lease, APL's exercise of its termination rights under the contract will enable CSX (as successor to Conrail) to exercise its own termination rights under the lease. APL warns: that termination of the lease would likely result in the loss of a critical operational facility (APINY), not to mention the loss of APL's \$25 million investment in that facility; and that, although the Transaction Agreement gives both CSX and NS access to APINY, the termination of the lease, by terminating APL's access to APINY, would effectively bar NS from serving APL at that facility, see, APL-27 at 12.

would like to enjoy, as soon as possible, the benefits of CSX vs. NS competition;⁸³ but, given the link between the contract and the lease, and given the especially favorable terms (*i.e.*, the \$1 a year rental) of the lease, APL would like to enjoy the benefits of CSX vs. NS competition without exercising its termination rights under the contract. And, APL claims, it reads *Decision No. 89* as providing that it will be able to enjoy the benefits of that competition without exercising its termination rights under the APL/Conrail contract.⁸⁴ APL concedes, however, that *Decision No. 89* is subject to other readings as well.⁸⁵

APL insists that its reading of *Decision No. 89* (*i.e.*, a reading that would allow APL to enjoy the benefits of the new CSX vs. NS competition without exercising its termination rights under the APL/Conrail contract): would put contract shippers in the same position on Day 181 as those shippers would have been in on Day One but for the antiassignment override and the approval of Section 2.2(c) of the Transaction Agreement;⁸⁶ would recognize that, at the time the APL/Conrail contract was negotiated, neither APL nor Conrail envisioned the break-up and sale of Conrail to two carriers;⁸⁷ would recognize that APL is the innocent party in this proceeding;⁸⁸ and would extricate APL from the no-win situation it will be in if it must risk the loss of the APL/Conrail lease in order to achieve the benefits of CSX vs. NS competition with respect to traffic now moving under the APL/Conrail contract.⁸⁹ APL adds that a contrary reading of *Decision No. 89* (*i.e.*, a reading that would require APL to exercise its termination rights under the APL/Conrail contract in order to take advantage of the new CSX vs. NS competition): would fracture the contract cornerstone of the Staggers Act by effectively voiding a negotiated contract; would, by allowing CSX and NS to allocate the traffic under the APL/Conrail contract, unfairly accord these newcomers to the contract

⁸³ APL notes that, after Day One, CSX and NS will both serve the six "Dual Points" of Chicago, Cleveland, Columbus, Baltimore, St. Louis, and South Kearny. It is, APL indicates, for service between these points that APL expects CSX and NS to compete to serve APL beginning on Day 181.

⁸⁴ APL cites this statement in support of its reading: "After [Day 180], APL will have the right to exercise all of its contractual rights and, if they permit, contract with both NS and CSX in this region." *See, Decision No. 89*, 3 S.T.B. at 315. And, APL adds, we must have had the APL/Conrail lease in mind when we referred to contracting "in this region." *See, APL-27* at 3 n.7.

⁸⁵ APL claims that multiple readings are possible because the seven (by APL's count) references to the subject in *Decision No. 89* are not entirely consistent. APL cites *Decision No. 89*, 3 S.T.B. at: 213 n.27 (second sentence); 252 (last sentence of the top paragraph); 254 (first full paragraph); 272-73 (last paragraph on page 272 and ending at the top of page 273); 315 (the first paragraph in the APL section); 373 (last paragraph beginning on page 373 and ending at top of page 374); and 387 (second sentence of ordering paragraph 10).

⁸⁶ The Transaction Agreement governs the CSX/NS/CR transaction. *See, Decision No. 89*, at 219. Section 2.2(c) of the Transaction Agreement provides for the allocation, between CSX and NS, of Conrail's Existing Transportation Contracts. *See, Decision No. 89*, 3 S.T.B. at 450. APL claims that, on Day One, were it not for the antiassignment override and the approval of Section 2.2(c): CSX and NS would jointly assume the obligation to serve APL under the APL/Conrail contract; and APL would have the right to select which of the two carriers it wished to use at Dual Points under the APL/Conrail contract.

⁸⁷ APL indicates that, had such a scenario been envisioned, it would have negotiated a provision specifically governing the partition of the contract.

⁸⁸ APL explains, in this connection, that it was not a party to the division of Conrail.

⁸⁹ APL claims that it is particularly important that APL have the right to select its own carrier in view of the fact that CSX owns two of APL's key competitors (*i.e.*, Sea-Land and CSXI).

greater rights with respect thereto than are accorded to APL, one of the original parties to the contract; and would allow Section 2.2(c) to prohibit competition between CSX and NS for Dual Point traffic after the end of the 180-day period beginning on Day One.

APL asks that we take the following action to clarify *Decision No. 89*. (1) APL asks that we affirm that the right of CSX and NS to allocate traffic to Dual Points under Section 2.2(c) will terminate on Day 180. (2) APL asks that we affirm: that, beginning on Day 181, it will be able to select the railroad that will serve it at Dual Points; and, in particular, that it will be able to make that selection without invoking the APL/Conrail contract's antiassignment provision, invocation of which would terminate the APL/Conrail contract.⁹⁰ (3) APL, noting that *Decision No. 89* references "180 days" and "6 months" as if the two meant precisely the same thing,⁹¹ suggests that it would be helpful if we would clarify that the time period referenced in ordering paragraph 10 (and throughout *Decision No. 89*) is 180 days, not 6 months.⁹²

The CSX-162 Response. CSX, citing the "plain meaning" of ordering paragraph 10,⁹³ contends that *Decision No. 89* is unambiguous in all pertinent respects and does not need clarification, and that the APL-27 petition should therefore be denied. CSX adds, however, that it agrees with APL, and would therefore not be opposed to clarification by the Board, that the period intended by ordering paragraph 10 is 180 days, not 6 months.

THE NADLER DELEGATION'S APPLICATION. The Nadler Delegation contends that we erred in not imposing the conditions it has heretofore requested. *See, Decision No. 89*, 3 S.T.B. at 500-03 (summary of the evidence and arguments, and the related requests for affirmative relief, contained in the Nadler Delegation's submissions). *See also, Decision No. 89*, 3 S.T.B. at 503-08 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by: the State of New York, acting by and through its Department of Transportation (NYDOT); and the New York City Economic Development Corporation (NYCEDC), acting on behalf of the City of New York). *See also, Decision No. 89*, 3 S.T.B. at 279-84 (our analysis of the "east of the Hudson" issues raised by NYDOT, NYCEDC, and the Nadler Delegation). *See also, Decision No. 89*, 3 S.T.B. at 388-89 (ordering paragraphs 22, 28, 29, 30, and 31).⁹⁴

⁹⁰ APL adds that it is prepared to negotiate a market-based lease of APINY with CSX, so long as APL is reimbursed for its \$25 million investment; and retains continued use of APINY, whether served by CSX or NS. *See, APL-27* at 14 n.20.

⁹¹ APL cites *Decision No. 89*, 3 S.T.B. at 213, 254, 272-73, 275, 276, 315, 381 and 386-87.

⁹² APL contends that, for all concerned, it will probably be easier to calculate the first day following the last day of a 180-day period than to calculate the first day following the last day of a 6-month period.

⁹³ *See, CSX-162* at 3.

⁹⁴ These ordering paragraphs: (22) require applicants to monitor origins, destinations, and routings for the truck traffic at their intermodal terminals in Northern New Jersey and in the Commonwealth of Massachusetts; (28) require CSX to attempt to negotiate, with CP (Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited are referred to collectively as CP), an agreement pursuant to which CSX will grant CP either haulage rights or trackage rights over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens); (29) require CSX to make an offer to the City of New York to establish a committee intended to develop ways to promote the development of rail traffic to and from the City; (30) require CSX to cooperate with the New York interests in studying the feasibility of upgrading cross-harbor float and tunnel facilities to facilitate cross-harbor rail movements, and, in particular, require CSX (continued...)

Relief Sought By The Nadler Delegation. (1) Reconsideration Request. The Nadler Delegation argues, in general, that we erred in not imposing the conditions it requested. *See, Decision No. 89, 3 S.T.B. at 502-03* (conditions requested by the Nadler Delegation). The Nadler Delegation argues, in particular, that we erred: in finding a lack of traffic in the “east of the Hudson” New York City region;⁹⁵ in anchoring potential future operations by CP and/or P&W to Fresh Pond Yard and Harlem River Yard;⁹⁶ in leaving NYCH’s facilities in NYCH’s control;⁹⁷ in requiring only CSX, and not both CSX and NS, to participate in a solution of the cross-harbor access problem;⁹⁸ in not imposing specific defined tasks and goals, the existence of which would allow us to measure compliance with our directives;⁹⁹ in not requiring the establishment of NS RoadRailer operations via the Hudson and East River tunnels;¹⁰⁰ in not bringing the CSX/NS/CR transaction into compliance with the Clean Air Act;¹⁰¹ and in not bringing the CSX/NS/CR transaction into compliance with Title VI of the Civil Rights Act of 1964.¹⁰²

⁹⁴(...continued)

to participate in New York City’s Cross Harbor Freight Movement Major Investment Study; and (31) require CSX to discuss with Providence and Worcester Railroad Company (P&W) the possibility of expanded P&W service over trackage or haulage rights on the line between Fresh Pond, NY, and New Haven, CT.

⁹⁵ *See, Decision No. 89, 3 S.T.B. at 280 & n.124.* The market, the Nadler Delegation claims, is huge.

⁹⁶ The Nadler Delegation claims that Fresh Pond Yard (in Queens) is: the smallest facility in the region; the one facility most hemmed in by a residential neighborhood; and the least expandable of the region’s remaining railway yards. The Nadler Delegation further claims that the entire capacity of Harlem River Yard (in the Bronx) is intended for garbage transloading and for servicing the Hunt’s Point produce market, and that its remaining capacity, if any, is totally inadequate to support both CSX and CP intermodal services. The Nadler Delegation would prefer that CP and/or P&W be allowed access to the 65th Street Yard (in Brooklyn), which (the Nadler Delegation claims) is but 11 miles from Fresh Pond Yard, via the nearly unused Bay Ridge Line; is on the Brooklyn waterfront, an industrial area; and is not in the middle of a residential neighborhood.

⁹⁷ The Nadler Delegation claims that NYCH has failed to provide needed services over a substantial period of time.

⁹⁸ *See, Decision No. 89, 3 S.T.B. at 389* (ordering paragraph 30).

⁹⁹ *See, apparently, Decision No. 89, 3 S.T.B. at 389* (ordering paragraphs 30 and 31).

¹⁰⁰ The Nadler Delegation claims that, because the New York-New Jersey metropolitan region’s severe air quality problems are related directly to overdependence on cross-harbor trucking, it is irrational to confine NS RoadRailer services to the west side of the Hudson River.

¹⁰¹ The Nadler Delegation insists: that the CSX/NS/CR transaction will add hundreds of trucks across the Bronx and Manhattan every day; and that, in a region already suffering the extreme adverse health effects of excessive air pollution, no increase in truck traffic is lawful under the Clean Air Act.

¹⁰² The Nadler Delegation contends: that the New York Metropolitan Transportation Authority’s (NYMTA’s) pre-transaction ban on garbage traffic on NYAR bars all such traffic from all NYMTA railways on Long Island; that *Decision No. 89* provides for competitive access only by CP via the Hudson Division (the Hudson Division is Conrail’s east-of-the-Hudson line, running between Albany and New York City); that, in view of the NYMTA ban, the practical effect of *Decision No. 89* will be to make the minority neighborhoods of the South Bronx the only location in the entire New York Metropolitan Area at which garbage can be loaded on rail cars for export

(continued...)

3 S.T.B.

(2) *Stay Request.* The Nadler Delegation adds: that applicants and the Nadler Delegation have agreed to enter into discussions in an attempt to resolve the issues raised by the Nadler Delegation; that these discussions will include all rail carriers in the affected region; and that it would be best if we would defer action on the Nadler Delegation's reconsideration request until sufficient time has elapsed to determine if these discussions will be successful. The Nadler Delegation therefore asks that its application for reconsideration be marked as timely filed but that all action thereon be stayed until July 20, 1999, or until such earlier time as any party shall move to reopen the matter.

The CSX/NS-216 Response. As respects the Nadler Delegation's reconsideration request, CSX and NS contend: that the action we took in Decision No. 89¹⁰³ went further than our precedents permitted us to go in dealing with proposals for increased rail service made by civic and governmental groups in a rail merger proceeding,¹⁰⁴ that the issues raised by the Nadler Delegation in its reconsideration request are essentially attempts to reargue matters that were brought forward before and on which we have already passed,¹⁰⁵ and that the Nadler Delegation has not made the showing contemplated by our regulations (*i.e.*, material error, new evidence, or changed circumstances). CSX and NS therefore urge the denial of the Nadler Delegation's reconsideration request.

As respects the Nadler Delegation's stay request, CSX and NS contend: that they are interested in having discussions, with the Nadler Delegation and with other parties as well, with respect to the provision of improved rail service to New York City; that it is to be hoped that such discussions will yield agreements that will launch private and public initiatives that may, over time, bring increased use of rail services to New York City and the rest of the "East of the Hudson" region; that, however, a year's stay of consideration of the Nadler Delegation's reconsideration request would serve no purpose and would not contribute to orderly procedure; and that the public interest will be amply protected by the conditions we imposed,¹⁰⁶ and also by our retained powers over the CSX/NS/CR transaction¹⁰⁷ and our general powers to enforce the pertinent statutes. CSX and NS therefore urge the denial of the Nadler Delegation's stay request.

The NYS-29 Reply. NYDOT indicates that, in general, it neither supports nor opposes the Nadler Delegation's requests for reconsideration and stay. NYDOT adds, however: that it is vitally important that our disposition of these requests should not be allowed to delay, or otherwise adversely affect, full and timely implementation of the procompetitive east-of-the-Hudson conditions

¹⁰²(...continued)

from the region; and that, therefore, *Decision No. 89*, by failing to provide access to NYAR facilities and access to the South via the cross-harbor floats, will create a disparate impact on minority residential areas.

¹⁰³ The reference is to the conditions embraced in ordering paragraphs 22, 28, 29, 30, and 31.

¹⁰⁴ CSX and NS have indicated, however, that they have accepted the conditions embraced in ordering paragraphs 22, 28, 29, 30, and 31. *See*, CSX/NS-216 at 4-5.

¹⁰⁵ CSX and NS add that the allegation that the NYMTA, in imposing a ban on garbage traffic at points on Long Island, has manifested racial bias, does not seem to raise an issue within our jurisdiction.

¹⁰⁶ The reference, again, is to the conditions embraced in ordering paragraphs 22, 28, 29, 30, and 31. *See*, CSX/NS-216 at 7.

¹⁰⁷ *See*, *Decision No. 89*, 3 S.T.B. at 385 (ordering paragraph 1; we expressly reserved jurisdiction to implement the 5-year oversight condition).

we adopted in *Decision No. 89*,¹⁰⁸ that, in any event, the Nadler Delegation's arguments are in error insofar as such arguments rest on the notion that the "east of the Hudson" rail infrastructure is inadequate to support the procompetitive rail access contemplated by *Decision No. 89*,¹⁰⁹ and that NYDOT does not subscribe to the charge that the limited moratorium on the movement of municipal solid waste via NYAR was motivated by racial bias.¹¹⁰

The NYCH-5 Reply. NYCH, which claims that it is capable of providing an effective cross-harbor rail service,¹¹¹ contends that the Nadler Delegation's remarks concerning NYCH are incorrect and defamatory. NYCH further contends: that, although the Nadler Delegation would like to include NYCH's assets in a Shared Assets Area, the Nadler Delegation has not demonstrated that NYCH's rail services are in financial or operating jeopardy; and that, although the Nadler Delegation would like to force the acquisition of NYCH's assets under 49 U.S.C. 10907(c), the Nadler Delegation has not identified an applicant for such acquisition. NYCH therefore urges the denial of the relief sought by the Nadler Delegation.¹¹²

The NYAR No. 7 Reply. NYAR contends that the Nadler Delegation's reconsideration request should be denied insofar as that request concerns NYAR's Bay Ridge Line; joint use of the Bay Ridge Line, NYAR insists, is simply not feasible, neither operationally, nor economically, nor legally. *See, generally, Decision No. 89*, 3 S.T.B. at 420-21 (summary of the evidence and arguments submitted by NYAR). NYAR adds: that the Nadler Delegation's reconsideration request, insofar as it seeks to insert CP onto the Bay Ridge Line, seeks, in essence, a new condition not previously sought; that Metro-North Commuter Railroad Company (MNCR)¹¹³ has not banned municipal solid waste traffic over NYAR; that, in fact, the only "ban" on municipal solid waste traffic over NYAR is a temporary moratorium that exists at the request of the Governor of New York, and that will expire in December 1999; that, although NYAR would be willing to participate in discussions regarding the improvement of rail service east of the Hudson, NYAR should not have to face uncertainty as to critical portions of its franchise while any such discussions are conducted; and that we should therefore act now on, and not stay our consideration of, that portion of the Nadler Delegation's reconsideration request that concerns the Bay Ridge Line and/or NYAR.

¹⁰⁸ The reference is to the conditions embraced in ordering paragraphs 22, 28, 29, and 30. *See, NYS-29* at 2 and 4.

¹⁰⁹ The reference is to the conditions embraced in ordering paragraphs 28 and 29. *See, NYS-29* at 3 & n.5.

¹¹⁰ NYDOT also claims that this charge is beyond the scope of our jurisdiction.

¹¹¹ *See, Decision No. 89*, 3 S.T.B. at 421-22 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by NYCH).

¹¹² NYCH adds that, because *Decision No. 89* does not appear to address the 49 U.S.C. 10907(c) issue, we should, in our decision addressing the Nadler Delegation's reconsideration/stay requests, "affirmatively address" and deny the Nadler Delegation's request for relief under 49 U.S.C. 10907(c). *See, NYCH-5* at 5. We did not explicitly address this issue in *Decision No. 89*, *see Decision No. 89*, 3 S.T.B. at 284 (our discussion of the issues raised by NYCH), because NYCH, which "declined to participate extensively in these proceedings after December 1997," *see, NYCH-5* at 2, did not raise this issue in a timely fashion. *See also, Decision No. 89*, 3 S.T.B. at 422 n.328 (we rejected NYCH's late-filed reply to the Nadler Delegation's brief; although the Nadler Delegation's brief was filed February 23, 1998, NYCH's reply thereto was not tendered for filing until May 29, 1998). *But see, Decision No. 89*, 3 S.T.B. at 281 (we indicated that proposals such as the Nadler Delegation's would "likely be outside of our authority to grant" vis-à-vis use of the rail property of NYCH).

¹¹³ MNCR is an NYMTA subsidiary. *See, Decision No. 89*, 3 S.T.B. at 507 n.525.

ZEE FRANK'S APPEAL. Ms. Frank's appeal is focused upon issues concerning rail facilities in the Bronx.

Relief Sought By Ms. Frank. Ms. Frank contends, in essence, that we erred in not protecting the public interest in rail access to Oak Point Yard and Harlem River Yard and the public interest in rail operations via Oak Point Link.¹¹⁴

(1) *The Merits.* Ms. Frank claims: that the public money that has been invested in the Oak Point and Harlem River Yards and in the Oak Point Link has not been properly used; that, in fact, this money has been diverted to the benefit of certain private interests; that these private interests have arranged that facilities that should have been used for rail purposes have been used for non-transportation purposes instead; that this diversion of public money by and to private interests has had adverse economic consequences¹¹⁵ and adverse environmental consequences as well;¹¹⁶ and that, in *Decision No. 89*, we failed to take the action needed to rectify these injustices.

(2) *Ancillary Relief.* Ms. Frank has submitted, with her appeal, a motion: to join her appeal with the "appeal" filed by Rep. Nadler; and to waive the requirement that she serve copies of her appeal on all parties.

THE IP&L-15 PETITION. IP&L seeks reconsideration and/or clarification of *Decision No. 89* as respects our treatment of IP&L's request for the imposition of conditions regarding coal traffic moving to its Perry K and Stout plants, both of which (IP&L contends) could be served pre-transaction by two railroads: Indiana Southern Railroad, Inc. (ISRR); and Indiana Rail Road Company (INRD, an 89%-owned CSX subsidiary). See, *Decision No. 89*, 3 S.T.B. at 462-66 (summary of the evidence and arguments, and the related requests for affirmative relief, contained in IP&L's submissions). See also, *Decision No. 89*, 3 S.T.B. at 416-17 (summary of the evidence and arguments, and the related requests for affirmative relief, contained in ISRR's submissions). See also, *Decision No. 89*, 3 S.T.B. at 319-20 (our discussion of IP&L's relevant issues) and at 93-95 (our overlapping discussion of Indianapolis issues). See also, *Decision No. 89*, 3 S.T.B. at 388 (ordering paragraph 23).

Relief Sought By IP&L. (1) *Perry K.* In *Decision No. 89*, we stated "that no remedy is required at Perry K," see, *Decision No. 89*, 3 S.T.B. at 319, but, in fact, we did provide a remedy at Perry K: we ordered applicants "to amend their agreements to permit NS to interchange with ISRR at its existing milepost 6 for movements to Stout and Perry K," see, *Decision No. 89*, 3 S.T.B. at 320 (emphasis added). See also, *Decision No. 89*, 3 S.T.B. at 388 (ordering paragraph 23; emphasis added: applicants "must allow for the creation of an NS/ISRR interchange at MP 6.0 on ISRR's Petersburg Subdivision for traffic moving to/from either the Stout plant or the Perry K plant").

¹¹⁴ Oak Point Yard and Harlem River Yard are rail facilities located in the Bronx. Oak Point Link (so called because it will end at Oak Point Yard) is a \$200 million rail bypass track that has been constructed on a trestle in the Harlem River, that will enable freight trains to avoid congestion at Mott Haven Junction and nearby locations. See, *Decision No. 89*, 3 S.T.B. at 504 n.518.

¹¹⁵ The cited adverse economic consequences reflect the frustration of public efforts to improve New York City's rail infrastructure.

¹¹⁶ The cited adverse environmental consequences reflect the health effects (asthma, etc.) of excessive reliance on truck transport. These health effects are alleged to be particularly serious in the minority communities of the South Bronx.

IP&L asks that we clarify and/or reconsider our intentions vis-à-vis the routing of its Perry K trains and its obligations to pay a switching charge for its Perry K trains.¹¹⁷

As respects the routing matter, IP&L contends: that the pre-transaction CR/ISRR Perry K interchange is at Crawford Yard;¹¹⁸ that, under applicants' proposed approach, the post-transaction CSX/ISRR Perry K interchange will be at Hawthorne Yard, which will require IP&L's Perry K trains to pass by Crawford Yard and to proceed in an easterly direction past Perry K to Hawthorne Yard, and then to return in a westerly direction from Hawthorne Yard to Perry K; and that the pre-transaction Crawford Yard interchange is far more efficient than the contemplated post-transaction Hawthorne Yard interchange. And, IP&L adds, it suspects that it will be required to pay for this inefficiency by reimbursing CSX, directly or indirectly, for its switching services (the reimbursement anticipated by IP&L would consist of a trackage rights fee for a movement to Hawthorne Yard, and a switch charge for the movement from Hawthorne Yard to Perry K). IP&L, insisting that we could not have intended to require IP&L to pay more for a less efficient service, asks that we clarify that its Perry K trains will be routed post-transaction as they were pre-transaction (i.e., through Crawford Yard directly into Perry K, and not through Hawthorne Yard).¹¹⁹

As respects the switching charge matter, IP&L's position reflects its belief that, as matters now stand, CSX, which will be the only rail carrier with direct access to Perry K and which will also control INRD, will be able to eliminate IP&L's competitive options at Perry K.¹²⁰ IP&L contends: that, with the current movement options to Perry K (either ISRR/CR or INRD via Conrail switch), IP&L is not required to pay both a trackage rights fee and a switching charge;¹²¹ and that, because it is not obligated to pay both a trackage rights fee and a switching charge pre-transaction, it should not be obligated to pay both a trackage rights fee and a switching charge post-transaction. IP&L therefore asks that we clarify that movements to Perry K will be charged only a trackage rights fee and not a switching fee. IP&L adds that the most practical way to ensure that its pre-transaction Perry K competitive options are preserved and that IP&L does not have to pay inappropriate

¹¹⁷ As discussed below in connection with IP&L's requests vis-à-vis Stout, IP&L has also asked that we clarify that the NS/ISRR interchange that applicants must allow must be at Crawford Yard, and not at MP 6.0.

¹¹⁸ IP&L indicates that Crawford Yard is also known as GM Yard.

¹¹⁹ IP&L adds that, if we did indeed intend for Perry K trains to be routed through Hawthorne Yard, we should reconsider this aspect of *Decision No. 89*.

¹²⁰ IP&L insists that we erred in applying our "bottleneck" presumption to Perry K. See, *Decision No. 89*, 3 S.T.B. at 319 (we agreed with applicants that "Conrail is already a bottleneck carrier controlling rail access" to Perry K). IP&L contends, in essence, that, although Conrail is the only rail carrier with direct access to Perry K, Conrail does not actually have bottleneck power vis-à-vis Perry K. (i) IP&L claims that, whereas Conrail is neutral as between ISRR and INRD (the carriers that originate Perry K's coal), CSX, which has an 89% controlling interest in INRD, will not be neutral as between ISRR and INRD. (ii) IP&L further claims: that, as a practical matter, Conrail cannot exercise bottleneck power vis-à-vis Perry K, because IP&L can ship coal to Perry K via a rail/truck movement not involving Conrail (INRD to Stout; truck to Perry K); but that CSX will be able to exercise bottleneck power vis-à-vis Perry K, because CSX controls INRD (which is to say that the rail/truck option that does not involve Conrail will involve CSX).

¹²¹ IP&L claims that, as respects Perry K coal originated by ISRR, IP&L pays neither a switching charge nor a trackage rights fee but only a single through rate (because, IP&L indicates, Conrail once owned the ISRR line and entered into a contract with IP&L prior to the sale of the line to ISRR). IP&L claims that, as respects Perry K coal originated by INRD, IP&L pays only a switching charge, but not a trackage rights fee, for INRD movements to Perry K via Conrail.

switching charges and trackage rights fees would be to clarify that NS (or ISRR) may serve Perry K directly from Crawford Yard.

(2) *Stout*. In *Decision No. 89*, we provided several remedies at Stout. We stated that applicants must allow IP&L to choose between having Stout served by NS directly or via switching by INRD; must allow for the creation of an NS/ISRR interchange at MP 6.0 on ISRR's Petersburg Subdivision for traffic moving to/from Stout; and must provide conditional rights for either NS or ISRR to serve any build-out to the Indianapolis Belt Line. See, *Decision No. 89*, 3 S.T.B. at 320 & n.180; see also, *Decision No. 89*, 3 S.T.B. at 388 (ordering paragraph 23). IP&L asks that we clarify and/or reconsider our intentions vis-à-vis the location of the NS/ISRR interchange and IP&L's obligations to pay a switching charge for its Stout trains.

As respects the NS/ISRR interchange, IP&L contends that, in fact, there is not now, and there cannot be, an interchange at MP 6.0. IP&L claims: that, although legal title in the Petersburg Subdivision passes from ISRR to Conrail at MP 6.0, the CR/ISRR interchange is at Crawford Yard and not at MP 6.0; that there is no interchange point at MP 6.0; and that, as a practical matter, interchange simply cannot occur at MP 6.0. IP&L therefore asks that we preserve the pre-transaction status quo by clarifying that applicants must allow for the creation of an NS/ISRR interchange at Crawford Yard.¹²²

As respects the switching charge matter, IP&L notes that we stated that the condition we were imposing vis-à-vis Stout "will result in availability of direct NS service *presumably* free of CSX switching charges," *Decision No. 89*, 3 S.T.B. at 295 n.151 (emphasis added). IP&L contends: that there is no logical reason for imposition of a CSX or INRD switch charge if NS or ISRR serves Stout directly, because, under such circumstances, neither CSX or INRD would perform a switch service; and that IP&L is entitled to a clear ruling that neither CSX nor INRD will be permitted to impose a switching charge at Stout if either NS or ISRR provides direct service at Stout. IP&L therefore asks that we delete the word "presumably" from footnote 151.¹²³

The CSX-163 Reply. CSX, which has accepted our IP&L conditions as set forth in ordering paragraph 23,¹²⁴ insists that, with these conditions, IP&L will be better off post-transaction than it was pre-transaction.

(1) *Perry K*. As respects the routing matter, CSX contends: that, because CSX will provide the same service post-transaction that Conrail provided pre-transaction, it is hard to see why IP&L's Perry K coal routings would become less efficient;¹²⁵ that, in addition, although only one carrier (Conrail) can access Perry K pre-transaction, two carriers (CSX and NS) will be able to access Perry K post-transaction; and that IP&L only stands to gain by having NS access Perry K. CSX therefore argues: that, for these reasons, we were correct in concluding "that no remedy is required at

¹²² Although this clarification request is included in the portion of IP&L's petition concerning Stout, see, IP&L-15 at 2, we assume that IP&L intended this clarification request to apply both to Stout and to Perry K.

¹²³ We have defined "CSX" as including CSX's wholly owned subsidiaries. See, *Decision No. 89*, 3 S.T.B. at 207 n.3. IP&L defines "CSX" as also including, for purposes of the IP&L-15 petition, CSX's 89%-owned INRD subsidiary. See, IP&L-15 at 3 n.2. The relief requested by IP&L vis-à-vis footnote 151, using our terminology, would require the relevant clause to be revised to read: "the condition we are imposing on traffic to IP&L's Stout plant will result in availability of direct NS service free of CSX and/or INRD switching charges."

¹²⁴ See, *Decision No. 89*, 3 S.T.B. at 388 (ordering paragraph 23).

¹²⁵ CSX concedes, however, that, for operational reasons, it will route Perry K-bound coal cars through Hawthorne Yard.

Perry K,” *Decision No. 89*, 3 S.T.B. at 319; and that, also for these reasons, IP&L’s routing matter request should be denied.

As respects the switching charge matter, CSX contends: that, even if it were true that INRD movements to Stout compete with Conrail movements to Perry K, the fact of the matter is that, whereas one carrier (Conrail) exercised total control over rail movements to Perry K pre-transaction, two carriers (CSX and NS) will have access to Perry K post-transaction; and that, even if it were true that CSX will favor INRD over ISRR as a source-serving carrier for Perry K movements, such vertical integration by a destination carrier does not justify relief under applicable precedent. CSX further contends: that it is entitled to compensation for the NS line-haul movement over the CSX-allocated line into Hawthorne Yard; and that it is also entitled to “cost-based” compensation, *see, Decision No. 89*, 3 S.T.B. at 319, for the switching movement out of Hawthorne Yard, on non-CSX traffic bound for delivery to Perry K. CSX therefore argues: that, for these reasons, we were correct in concluding “that no remedy is required at Perry K,” *Decision No. 89*, 3 S.T.B. at 319; and that, also for these reasons, IP&L’s switching charge request should be denied.

(2) *Stout*. As respects the NS/ISRR interchange, CSX contends that, whereas an NS/ISRR interchange at MP 6.0 could be accomplished,¹²⁶ an NS/ISRR interchange at Crawford Yard might well disrupt CSX’s operations at that small and heavily used facility, with severe negative repercussions for service to other shippers throughout the Indianapolis area. And, CSX adds, the fact that the pre-transaction CR/ISRR interchange is at Crawford Yard does not mean that the post-transaction NS/ISRR interchange must also be at Crawford Yard.¹²⁷ CSX therefore asks that we deny IP&L’s NS/ISRR interchange request.

As respects the switching charge matter, CSX indicates that it does not oppose the deletion of the word “presumably” from footnote 151.

The ISRR-11 Reply. ISRR urges us to grant the relief sought in the IP&L-15 petition.

(1) *Perry K*. As respects the routing matter, ISRR contends: that, as a practical matter, the pre-transaction Conrail was not a bottleneck carrier at Perry K (because IP&L’s Perry K options were not limited to rail-to-rail competition);¹²⁸ that, however, the post-transaction CSX will be a bottleneck carrier at Perry K (because CSX will control all of Perry K’s routing options); that, therefore, the CSX/NS/CR transaction will significantly reduce competition at Perry K;¹²⁹ that NS’ single-line access to Perry K via a CSX switch cannot possibly be competitive with any of the routing options Perry K enjoys today (because NS, unlike CSX, will have no nearby single-line coal sources); that, therefore, NS will be able to provide a competitive option at Perry K only if NS can deliver coal originated by ISRR; that, however, if the NS/ISRR interchange is at Hawthorne Yard, any coal movements from ISRR origins via NS will be inefficient and uneconomical (because NS would have to move its locomotives west from Hawthorne Yard past Perry K to MP 6 for interchange with ISRR, and proceed back east past Perry K to Hawthorne Yard for an interchange with CSX, whereupon CSX would have to proceed back west to Perry K); and that, furthermore, Hawthorne Yard is not conducive to an efficient interchange of unit coal trains. ISRR therefore insists: that, to preserve

¹²⁶ CSX notes that it is willing to grant NS trackage rights to permit an NS/ISRR interchange at MP 6.0 on the same basis that CSX has granted NS other trackage rights in Indianapolis.

¹²⁷ CSX notes, in this regard, that whereas Conrail has a financial interest in the CR/ISRR interchange (because Conrail gets a portion of the revenues), CSX will have no similar financial interest in the NS/ISRR interchange.

¹²⁸ *See, Decision No. 89*, 3 S.T.B. at 416-17 (the carryover paragraph at 416-17, and the first full paragraph at 417).

¹²⁹ ISRR indicates that it “supports IPL’s request for reconsideration of the Board’s finding that there will be no loss of competition at the Perry K Plant.” *See, ISRR-11* at 2.

IP&L's competitive options at Perry K, we should condition the CSX/NS/CR transaction by requiring that NS (or ISRR) be given trackage rights into Perry K; and that we should clarify that, except as varied by agreement of the parties, the NS/ISRR interchange should take place either at Crawford Yard or at Transfer Yard, but not at Hawthorne Yard.

As respects the switching charge matter, ISRR's remarks suggests that ISRR agrees with IP&L that movements to Perry K should be charged only a trackage rights fee and not a switching fee.

(2) *Stout*. As respects the NS/ISRR interchange, ISRR contends: that there has not been a CR/ISRR interchange at MP 6; that, in fact, a MP 6 interchange is not operationally practicable;¹³⁰ that, at present, the CR/ISRR interchange, for IP&L coal traffic and for all other traffic as well, is at Crawford Yard; and that, in view of the significant operational changes that may occur in Indianapolis post-transaction, it would be best to allow CSX, NS, and ISRR an opportunity to agree upon an interchange arrangement that is optimally efficient for all concerned. ISRR adds, however, that we should clarify that, in the absence of an agreement, the NS/ISRR interchange (for movements to Stout and Perry K) should take place at either Crawford Yard or Transfer Yard.

As respects the switching charge matter, ISRR's remarks suggests that ISRR would support the deletion of the word "presumably" from footnote 151.

THE TFI-8 PETITION. TFI seeks a definitive ruling on its assertion (hereinafter referred to as TFI's RCAF assertion) that, with one exception, we are simply not permitted to use any measure other than the RCAF-A as an adjustment mechanism for railroad rates or other charges.¹³¹ See, *Decision No. 89*, 3 S.T.B. at 448 n.401 (TFI contends that the RCAF-A is, whereas the RCAF-U is not, the rail cost adjustment factor provided for by 49 U.S.C. 10708; that, for this reason, and with the one exception noted in the next clause, we must use the RCAF-A in any adjustment mechanism adopted in this proceeding;¹³² but that, in view of the special circumstances applicable to the reduction in "switching rates" pursuant to the NITL agreement, an adjustment factor other than the RCAF-A may apply as to such rates).¹³³

Relief Sought By TFI. TFI, although conceding that we may have addressed its RCAF assertion *sub silentio*,¹³⁴ insists that we did not address that assertion explicitly; and TFI adds that, having properly raised the issue, it is entitled to a ruling (*i.e.*, an explicit ruling) with respect thereto. TFI concedes that, in view of our rejection of the market dominance presumption urged by TFI and

¹³⁰ ISRR claims: that its track at MP 6 consists of a single main line with no sidings; and that, in view of the narrow width of the right-of-way at MP 6, no sidings can be constructed at that point.

¹³¹ The Rail Cost Adjustment Factor is referred to as the RCAF. The Rail Cost Adjustment Factor adjusted for productivity is referred to as the RCAF-A. The Rail Cost Adjustment Factor unadjusted for productivity is referred to as the RCAF-U. See, *Decision No. 89*, 3 S.T.B. at 450 n.404.

¹³² See, *Decision No. 89*, 3 S.T.B. at 254 n.85 (discussion of RCAF-A, RCAF-U, and 49 U.S.C. 10708). See also, TFI-8 at 3 (line 3 reference is apparently to *Decision No. 89*, 3 S.T.B. at 254 n.85).

¹³³ TFI is apparently using the terms "switching rates" and "switching charges" interchangeably. Compare, *Decision No. 89*, 3 S.T.B. at 448 n.401 (line 6) with TFI-8 at 3 (line 9). TFI indicates that the "special circumstances" reflect: (i) the agreement by applicants to reduce the Conrail switching charges substantially from pre-transaction levels; and (ii) the fact that such charges are not typically adjusted every quarter or even every year. See, TFI-8 at 1 n.1.

¹³⁴ See, *Decision No. 89*, 3 S.T.B. at 395 (ordering paragraph 81; all conditions that were requested by any party but that have not been specifically approved are denied).

certain other parties, we had no compelling reason to address TFI's RCAF assertion in that context.¹³⁵ TFI claims, however, that, because its RCAF assertion applies to all applications of an inflation-adjusted mechanism (with the one exception previously noted), we were required to address TFI's RCAF assertion despite our rejection of the market dominance presumption. TFI argues, in this regard, that its RCAF assertion must be addressed: with respect to the adjustment mechanism applicable to the trackage rights fee agreed upon by CSX and NS;¹³⁶ and with respect to the adjustment mechanism provided for by Section III(E) of the NITL agreement.¹³⁷ TFI therefore contends: that we should clarify *Decision No. 89* by making explicit our ruling on TFI's RCAF assertion; and that, if in fact we intended to reject TFI's RCAF assertion, we should reconsider that aspect of *Decision No. 89*.

The IP&L-15 Petition. IP&L endorses TFI's RCAF assertion, and asks that we clarify that the RCAF-A must be the adjustment mechanism for the trackage rights fee that CSX will be charging in the Indianapolis area. See, IP&L-15 at 7 n.6.

The CSX/NS-211 Reply. CSX and NS urge denial of the TFI-8 petition. CSX and NS contend, in essence, that, as respects the two adjustment mechanisms referenced by TFI (the mechanism applicable to the trackage rights fee agreed upon by CSX and NS, and the mechanism provided for by Section III(E) of the NITL agreement), TFI's RCAF assertion was addressed in *Decision No. 89*. See, *Decision No. 89*, 3 S.T.B. at 385 (ordering paragraph 7; we approved, "[e]xcept as otherwise provided," the agreements respecting acquisition of trackage rights; this, CSX and NS contend, clearly requires application of the adjustment mechanism provided for by such agreements).¹³⁸ See also, *Decision No. 89*, 3 S.T.B. at 388 (ordering paragraph 20; we required applicants to adhere to all of the terms of the NITL agreement, with certain exceptions not presently relevant; this, CSX and NS contend, clearly requires application of the adjustment mechanism provided for by Section III(E) of the NITL agreement). CSX and NS further contend that TFI's RCAF assertion is simply wrong; nothing in 49 U.S.C. 10708, CSX and NS insist, requires application of an RCAF-A adjustment mechanism to all of the rates and charges involved in this proceeding.

The CSX-163 Reply. As respects IP&L's endorsement of TFI's RCAF assertion, the CSX-163 reply to the IP&L-15 petition adopts the arguments set forth in the CSX/NS-211 reply to the TFI-8 petition. See, CSX-163 at 5.

¹³⁵ See, *Decision No. 89*, 3 S.T.B. at 266 (rejecting the market dominance presumption).

¹³⁶ See, *Decision No. 89*, 3 S.T.B. at 345 n.216 (we noted that a significant shift in either total costs or total car miles could mean that the trackage rights fee would have to be adjusted; we did not, however, indicate what the adjustment mechanism might be; TFI claims that the adjustment mechanism must be the RCAF-A).

¹³⁷ See, *Decision No. 89*, 3 S.T.B. at 451 (this section, which is applicable to transportation services to Conrail shippers on routes over which at least 50 cars were shipped in the calendar year prior to the Control Date in single-line Conrail service which will become joint-line CSX-NS service after the Closing Date, provides that, upon request of an affected shipper, CSX and NS, for a period of 3 years, will work with the shipper to provide fair and reasonable joint-line service, and will maintain the Conrail rate, subject to RCAF-U increases; TFI claims that the adjustment mechanism must be the RCAF-A).

¹³⁸ CSX and NS note that these agreements provide for an adjustment mechanism that employs neither the RCAF-A nor the RCAF-U. See, e.g., CSX/NS-25, Volume 8B at 256-58. See also, *Decision No. 89*, 3 S.T.B. at 343-44 (we examined the issue of trackage rights compensation, and found that the agreed upon level of compensation "will allow the carriers receiving trackage rights to compete effectively").

ORDC's JULY 29th LETTER. ORDC urges clarification respecting our extension of the single-line to joint-line relief provided for in Section III(E) of the NITL agreement.

Relief Sought By ORDC. Section III(E), which applies to transportation services to Conrail shippers on routes over which at least 50 cars were shipped in the calendar year prior to the Control Date in single-line Conrail service which will become joint-line CSX-NS service after the Closing Date, provides that, upon request of an affected shipper, CSX and NS will, for a period of 3 years, (a) maintain the Conrail rate (subject to RCAF-U increases), and (b) work with the shipper to provide fair and reasonable joint-line service. See, *Decision No. 89*, 3 S.T.B. at 451. In *Decision No. 89*, we extended Section III(E) to single-line to joint-line situations involving a third carrier that is a Class III railroad. "[W]here a Class III railroad could provide [pre-transaction] through service connecting solely with Conrail, but will now have to provide a three-carrier connecting service with both CSX and NS, the Class III carrier, at its option, will be able to invoke the single-line to joint-line protections set forth in the NITL agreement." *Decision No. 89*, 3 S.T.B. at 254. See also, *Decision No. 89*, 3 S.T.B. at 272-72 (further discussion of single-line to joint-line issues). ORDC, which supports the extension of Section III(E) to shortline railroads, contends that the same reasons that justify that extension of Section III(E) also justify a further extension of Section III(E) to regional railroads and the shippers served by such regional railroads. ORDC therefore asks that we clarify that regional railroads and the shippers they serve are included within the single-line to joint-line relief we adopted in *Decision No. 89*.

The CSX/NS-213 Reply. CSX and NS, which oppose the clarification sought by ORDC, contend that, because Class III railroads are often surrogates for one or a few shippers, our extension of Section III(E) to such railroads appears to have been premised on the notion that Class III-Conrail service is similar, if not equivalent, to single-line Conrail service; but that, because regional railroads are generally larger than Class III railroads, the fact of the matter is that regional-Conrail service is more like conventional joint-line service and is not at all like single-line Conrail service. And, CSX and NS add, an extension of Section III(E) to regional railroads would tend to preserve inefficient routings in ways that are inappropriate and unwarranted. See, *CSX/NS-213* at 3 n.3.

THE WC-19 PETITION. WCL contends that reports filed by applicants pursuant to reporting element 11 of the operational monitoring condition imposed in *Decision No. 89* should be placed in the public docket as they are filed.

Relief Sought By WCL. The operational monitoring condition that we imposed in *Decision No. 89* requires applicants to file periodic status reports and progress reports. See, *Decision No. 89*, 3 S.T.B. at 366-71. See also, *Decision No. 89*, 3 S.T.B. at 387 (ordering paragraph 18). We indicated that most, though not all, of these reports, and certain incidental transmittal letters as well, will be placed in the docket (i.e., the public docket) as they are filed. See, *Decision No. 89*, 3 S.T.B. at 370-71 (reporting element 15).

The WC-19 petition is focused upon reporting element 11, which requires applicants to report on activities at certain yards. See, *Decision No. 89*, 3 S.T.B. at 370 (reporting element 11). See also, *Decision No. 89*, 3 S.T.B. at 611 (lists the yards covered by reporting element 11). The WC-19 petition is particularly focused upon the reports that will be submitted under reporting element 11 with respect to one CSX yard (Barr Yard in Chicago, IL) and two IHB yards (Blue Island Yard in Chicago, IL, and Gibson Yard in Hammond, IN).¹³⁹ WCL's grievance, as expressed in the WC-19 petition, is that the reports submitted under reporting element 11, and, in particular, the reports submitted thereunder respecting Barr Yard, Blue Island Yard, and Gibson Yard, will not be made

¹³⁹ IHB is a 51%-owned Conrail subsidiary. The CSX/NS/CR transaction contemplates that Conrail's IHB stock will continue to be owned by Conrail. See, *Decision No. 89*, 3 S.T.B. at 229.

public. There is, WCL insists, no reason to keep these reports secret; WCL claims that the information contained in the reports that will be submitted under reporting element 11 will not be commercially sensitive, and, in any event, will not be any more commercially sensitive than the substantially similar information contained in the reports that will be submitted under reporting element 7 with respect to operations in the Shared Assets Areas (SAAs).¹⁴⁰ And, WCL contends, given the importance of post-transaction operational issues in the Chicago switching district and on the IHB, WCL and other end-users of switching and terminal services in the Chicago area must have access to the information that applicants will be reporting under reporting element 11.

WCL therefore asks that we revise *Decision No. 89* by providing that reports filed by applicants pursuant to reporting element 11 will be placed in the public docket as they are filed.

The CSX/NS-215 Response. Applicants, urging denial of the WC-19 petition, contend: that the reports that will be submitted pursuant to reporting element 11 will contain commercially sensitive information; that this information, if it were publicly available, could be used by applicants' competitors to applicants' commercial disadvantage;¹⁴¹ that there is no inconsistency between the determination that certain information should be held confidential and the determination that other information should be made public;¹⁴² and that, in any event, WCL has demonstrated no need for the information it seeks.¹⁴³ And, applicants add, WCL's adversarial demand for commercially sensitive information from IHB, a carrier in which NS is acquiring an indirect financial interest, is inconsistent with undertakings entered into by WCL in its settlement agreement with NS.¹⁴⁴

Prairie Group's August 31st Statement. Prairie Group, an end-user of switching and terminal services in the Chicago area,¹⁴⁵ urges approval of the WC-19 petition. Communities, shippers, and

¹⁴⁰ See, *Decision No. 89*, 3 S.T.B. at 369 (reporting element 7). The SAA reports submitted under reporting element 7 will be made public. See, *Decision No. 89*, 3 S.T.B. at 370-71 (reporting element 15).

¹⁴¹ Applicants suggest, by way of example, that a competitor could use this information to suggest to a shipper that the Barr, Blue Island, and Gibson Yards are congested, and that the shipper should therefore make alternate arrangements with the competitor. And, applicants note, the shipper will have no way of comparing the congestion problems of applicants, on the one hand, and their competitors, on the other hand (because their competitors will not be filing reports under reporting element 11).

¹⁴² Applicants claim that the yards to be operated in the SAAs are provided special treatment because of the unique status of the SAAs; there are, applicants concede, "heightened public concerns about service in these innovative service districts." CSX/NS-215 at 4. And, applicants add, because the SAAs (unlike the Chicago switching district) will generally be served only from yards controlled by applicants, competitive harm is much less likely to follow from public disclosure of information about yard operations in the SAAs.

¹⁴³ Applicants claim: that the information about yard operations sought by WCL is not relevant to WCL's concern with IHB's status as an independent switching carrier, see, *Decision No. 89*, 3 S.T.B. at 431-32 (discussion of WCL's concerns); and that the effect of IHB's management change on its role as a neutral switching carrier will be monitored as part of the general oversight condition, see, *Decision No. 89*, 3 S.T.B. at 161. And, applicants add, WCL will not need the information it seeks in order to assess how its own business is being handled; WCL, applicants point out, will obviously be able to monitor its own traffic directly.

¹⁴⁴ See, *Decision No. 89*, 3 S.T.B. 431 at 229 n.360 (alludes to the WCL/NS settlement agreement).

¹⁴⁵ See, *Decision No. 89*, 3 S.T.B. at 490 (discussion of Prairie Group's concerns).

receivers, Prairie Group claims, should have access to the information they will need to monitor applicants' progress toward achieving promised improvements in rail operations.

The IMRL-9 Reply. I&M, a Class II railroad whose interests in this proceeding are focused upon intermediate switching services in the Chicago switching district,¹⁴⁶ urges approval of the WC-19 petition. I&M contends that public availability of the information to be provided on rail operations in the Chicago terminal and on the IHB is essential if our oversight and monitoring conditions are to be effective and credible.

IHB's September 2nd Response. IHB, urging denial of the WC-19 petition, contends: that, despite the CSX/NS/CR transaction, it will continue to exist as a neutral switching carrier; that the monitoring and reporting conditions imposed in *Decision No. 89* are adequate to protect the public interest in railroad competition in the Chicago switching district; that the monitoring and reporting requirements sought by WCL would jeopardize IHB's ability to compete with the other carriers that operate in the Chicago switching district; that, because the ownership of IHB itself (as opposed to the ownership of IHB's majority owner) will not change as a result of *Decision No. 89*, there is no justification for the imposition of the monitoring and reporting requirements sought by WCL; and that this consideration alone justifies the determination to treat information regarding IHB's operations as commercially sensitive and entitled to protection from disclosure.

THE WLE-9 PETITION. W&LE contends that the remedies we required applicants to provide to W&LE to prevent further erosion of W&LE's financial viability are insufficient. See *Decision No. 89*, 3 S.T.B. at 309-11 (our analysis of the issues raised by W&LE). See also, *Decision No. 89*, 3 S.T.B. at 392 (ordering paragraph 68). See also, *Decision No. 89*, 3 S.T.B. at 428-30 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by W&LE).

Relief Sought By W&LE. The WLE-9 petition consists of: a reconsideration/clarification request; and a "hold in abeyance" request.

(1) *Reconsideration/Clarification Request.* We stated, in *Decision No. 89*, that "a substantial amount of traffic, probably between \$1.4 and \$3.0 million, could be diverted from W&LE because of this transaction." See *Decision No. 89*, 3 S.T.B. at 310. W&LE insists that we drastically underestimated the post-transaction revenue losses that W&LE will confront. W&LE contends: that, even by applicants' estimates, W&LE's losses will be over \$2.0 million;¹⁴⁷ that, taking into account W&LE's projected \$1.8 million Huron Dock losses,¹⁴⁸ W&LE's losses will be over \$3.8 million;¹⁴⁹ that, taking into account W&LE's projected \$4.8 million losses on traffic that now moves in W&LE/NS joint-line service, W&LE's losses will be over \$8.6 million;¹⁵⁰ and that, by W&LE's own

¹⁴⁶ See, *Decision No. 89*, 3 S.T.B. at 412-13.

¹⁴⁷ W&LE notes that \$2.0 million is substantially greater than the \$1.4 million we have used as a minimum.

¹⁴⁸ W&LE insists that NS will have both the ability and the incentive to deprive W&LE of \$1.8 million in annual revenue derived from traffic hauled from/to the Huron Docks.

¹⁴⁹ This figure (\$3.8 million) equals the sum of \$2.0 million (the losses conceded by applicants) and \$1.8 million (the Huron Dock losses projected by W&LE). W&LE notes that \$3.8 million is substantially greater than the \$3.0 million we have used as a maximum.

¹⁵⁰ This figure (\$8.6 million) equals the sum of \$3.8 million (the sum of the losses conceded by applicants and the Huron Dock losses projected by W&LE) and \$4.8 million (the joint-line losses projected by W&LE). We stated, in *Decision No. 89*, that "it is inaccurate to assume, as W&LE uniformly does here, that NS single-line service will always replace a joint NS/W&LE service. If the W&LE routing and service is more efficient, as W&LE contends, then it is likely that NS would continue to use that service." See, *Decision No. 89*, 3 S.T.B. at 310. W&LE insists, however: that

(continued...)

calculations, its losses will be either \$9.1 million (excluding certain intermodal train losses and certain projected traffic increases), \$12.7 million (accounting for the intermodal train losses but excluding the projected traffic increases), or \$15.0 million (accounting for the intermodal train losses and the projected traffic increases).¹⁵¹ W&LE further contends that our underestimate of the magnitude of W&LE's losses is material to the scope and terms of the relief which is to be negotiated by the parties.¹⁵²

(2) "Hold In Abeyance" Request. W&LE contends that, at this point, we need not recalculate our W&LE loss estimate. Such a recalculation, W&LE fears, would prove time-consuming, and might jeopardize private negotiations among the parties. W&LE therefore asks: that we recognize that we understated the magnitude of the losses facing W&LE; and that we hold in abeyance further determinations as to the scope of such losses, until such time as the parties announce that negotiations have failed to produce a settlement.¹⁵³

The CSX/NS-212 Reply. Applicants, urging denial both of W&LE's reconsideration/clarification request and of its "hold in abeyance" request, contend: that W&LE's claim that *Decision No. 89* made erroneous findings regarding the impact of the CSX/NS/CR transaction on W&LE is simply wrong; and that, in any event, because W&LE has not actually sought reconsideration of any of the relief granted in *Decision No. 89* or of any of the conditions therein imposed, there is no basis for W&LE's request for reconsideration of our findings.¹⁵⁴ Applicants dispute W&LE's claim that our estimate of the magnitude of W&LE's losses is material to the scope and terms of the relief which is to be negotiated by the parties; there is, applicants insist, no reason to believe that the discussion in *Decision No. 89* of the transaction's impact on W&LE will have any impact on the negotiations (which, applicants indicate, have already commenced) among applicants and W&LE regarding the detailed terms of the trackage or haulage rights and the extension of the Huron Dock lease that the Board ordered applicants to provide to W&LE. And, applicants add, there is no reason to hold the WLE-9 petition in abeyance; holding the petition in abeyance, applicants insist, would not facilitate negotiations, but would merely leave the finality of *Decision No. 89* uncertain for an indefinite period.

ORDC's September 1st Letter Respecting WLE-9. ORDC, which supports the WLE-9 petition, contends: that we substantially understated the magnitude of loss facing W&LE as a result of the

¹⁵⁰ (...continued)

the record, and particularly applicants' own argument and testimony, simply does not support the proposition that shippers will continue to select NS/W&LE joint-line service where NS single-line service will become available; and that we erred in supposing otherwise.

¹⁵¹ See, WLE-9 at 3 n.2. See also, WLE-9, V.S. Pinkerton at 1 (Table 1). See also, WLE-9 at 2 (assertion that, even using applicants' methodology, W&LE's annual losses will be at least between \$4.2 million and \$6.6 million).

¹⁵² See, *Decision No. 89*, 3 S.T.B. at 392 (ordering paragraph 68). W&LE contends, in essence, that, if we had made a more realistic assessment of the magnitude of W&LE's losses, we would have awarded W&LE greater relief.

¹⁵³ Although W&LE suggests "that it is unnecessary for the Board to rule on [the WLE-9] petition at this time," WLE-9 at 3, W&LE apparently has in mind: that we should rule, at this time, that we committed material error in understating the magnitude of the losses facing W&LE; but that, for the present, we should hold in abeyance further determinations as to the scope of such losses and the nature of appropriate remedial measures to mitigate such losses.

¹⁵⁴ "Since W&LE is satisfied to accept the conditions the Board imposed in its favor, what else the Board may have said about the impact of the transaction on W&LE is irrelevant; it has no effect on W&LE's substantive rights." CSX/NS-212 at 5.

CSX/NS/CR transaction; that the remedial measures afforded W&LE must be adequate to assure that it can remain viable; and that a clearer statement of our intentions concerning the scope of specific arrangements that are to be negotiated could well serve to motivate appropriate private solutions in the interest of all concerned.

Bayer's September 1st Letter. Bayer, which supports the WLE-9 petition, contends: that CSX has claimed that we did not grant any rights to W&LE to serve Bayer at its facility at New Martinsville (Natrium), WV, which is located on the CSX line between Benwood and Brooklyn Junction, WV;¹⁵⁵ that CSX has claimed, rather, that it is only required to negotiate with W&LE if there is some mutual benefit to CSX;¹⁵⁶ and that CSX has therefore claimed that it is not required to negotiate any agreement with W&LE concerning shippers in the New Martinsville area, because any such agreement could not be beneficial to CSX. Bayer suggests: that we should hold the WLE-9 petition in abeyance until such time as negotiations between applicants and W&LE reach an impasse; and that, if negotiations do reach an impasse, we should clarify *Decision No. 89* by directing applicants to negotiate with W&LE, within a specific time frame, to permit W&LE to serve Bayer and other shippers on the line between Benwood and Brooklyn Junction.

THE SDB-15 PETITION. SDB contends that we erred in denying the protective conditions that it sought. See, *Decision No. 89*, 3 S.T.B. at 395 (ordering paragraph 81; all conditions that were requested but not specifically approved are denied). See also, *Decision No. 89*, 3 S.T.B. at 525-26 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by SDB).

Relief Sought By SDB. In *Decision No. 89*, we did not specifically explain our rationale for denying the conditions requested by SDB. SDB suspects, however, that we may have been under the impression that its requested conditions were addressed to a preexisting problem. See, *Decision No. 89*, 3 S.T.B. at 278 ("Many of the conditions requested have been denied because they are addressed to a preexisting problem."). SDB argues that, in reality, its requested conditions were not addressed to a preexisting problem; the threat the CSX/NS/CR transaction poses to SDB's Neomodal Terminal, SDB insists, reflects the fact "that the post-transaction CSX and the post-transaction NS will prefer to work with intermodal facilities located on their own lines." See, *Decision No. 89*, 3 S.T.B. at 525-26. SDB contends: that, pre-transaction, Neomodal was the only significant intermodal terminal in Northeast Ohio via which CSX and NS could compete with Conrail for Northeast Ohio and Western Pennsylvania intermodal business; that, however, the CSX/NS/CR transaction will allow CSX and NS to construct new intermodal terminals of their own in Northeast Ohio and/or Western Pennsylvania; and that, therefore, the real problems facing Neomodal are the post-transaction plans of applicants (which, by definition, are not "preexisting" problems). SDB further contends: that Neomodal provides valuable competitive intermodal service to Northeast Ohio shippers and represents a competitive alternative to applicants' intermodal service; that, if SDB had known "that CSX and NS were secretly buying Conrail in the time period prior to the start of the construction of Neomodal," SDB would not have expended \$11.2 million in public funds to build

¹⁵⁵ See, *Decision No. 89*, 3 S.T.B. at 392 (ordering paragraph 68; we directed applicants and W&LE to "attempt to negotiate an agreement concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregates shippers or to serve shippers along CSX's line between Benwood and Brooklyn Junction, WV"). See also, *Decision No. 89*, 3 S.T.B. at 310-11 (similar statement).

¹⁵⁶ See, e.g., CSX/NS-212 at 6 n.4.

Neomodal, SDB-15 at 4; and that SDB is entitled to protective conditions¹⁵⁷ to insure the continued viability of Neomodal and the preservation of the essential service (*i.e.*, the competitive intermodal service) provided by Neomodal.¹⁵⁸

The CSX/NS-210 Reply. CSX and NS contend: that the cause of Neomodal's problems is its poor location, not the CSX/NS/CR transaction; that CSX and NS were not "buying Conrail in the time period prior to the start of the construction of Neomodal"; that there was little secrecy surrounding the efforts of CSX and NS to buy Conrail; that neither CSX nor NS induced SDB to build Neomodal at its present location; that intermodal shippers in Northeast Ohio will benefit from the CSX/NS/CR transaction; that Neomodal will benefit from the conditions we imposed in favor of W&LE, on whose tracks Neomodal is located; and that the conditions sought by SDB would significantly improve Neomodal's situation beyond that which existed pre-transaction. CSX and NS therefore urge denial of the SDB-15 petition.

THE RBMN-10 PETITION. RBMN seeks clarification of ordering paragraphs 8, 10, 20, and 39. See, *Decision No. 89*, 3 S.T.B. at 386-90.

Relief Sought By RBMN. The RBMN-10 petition raises issues concerning Section III(E) of the NITL agreement (ordering paragraph 20), an antiassignment clause (ordering paragraphs 8 and 10), and a blocking provision (ordering paragraph 39).

(1) *The Section III(E) Issue: Ordering Paragraph 20.* Section III(E) of the NITL agreement, which applies to transportation services to Conrail shippers on routes over which at least 50 cars were shipped in the calendar year prior to the Control Date in single-line Conrail service which will become joint-line CSX-NS service after the Closing Date, provides that, upon request of an affected shipper, CSX and NS will, for a period of 3 years, (a) maintain the Conrail rate (subject to RCAF-U increases), and (b) work with the shipper to provide fair and reasonable joint-line service. Section III(E) further provides: that, if a shipper objects to the routing employed by CSX and NS, or to the point selected by them for interchange of its traffic, the disagreement over routing or interchange,

¹⁵⁷ The conditions previously requested by SDB are summarized in *Decision No. 89*, 3 S.T.B. at 525-26. The slightly different conditions requested in the SDB-15 petition are as follows: (1) written assurance, with remedies for 10 years, that at least one CSX intermodal train operating East and one CSX intermodal train operating West will stop daily at its Willard, OH, Yard and daily pick up and/or drop off cars to W&LE and Neomodal; (2) written assurance that CSX will connect W&LE directly into its Collingwood, OH, Yard and provide timely, reliable, daily access thereto; (3) written assurance, with remedies for 10 years, that at least one NS intermodal train passing through its Bellview, OH, Yard, in all directions, will daily stop and pick up or drop off cars to W&LE and Neomodal; (4) written assurance, with remedies, that CSX and NS will provide W&LE and Neomodal with competitive, timely schedules and reliable service within the CSX and NS systems; (5) written assurance, with remedies for 10 years, that CSX and NS will quote a levelized, total intermodal system haulage rate for CSX Collingwood, NS Cleveland, NS Pittsburgh, and W&LE/Neomodal CSX and NS, such that W&LE and Neomodal are not placed at a disadvantage in the Northeast Ohio marketplace vis-à-vis other CSX and NS Ohio and Western Pennsylvania terminals; (6) written assurance, with remedies, that CSX and NS will provide a steady, timely supply of empty containers and trailers and intermodal rail cars to Neomodal, as required; (7) a requirement that CSX and/or NS will enter into guaranteed 10-year take or pay lift contract(s) with Neomodal at a 1998 level of 20,000 lifts per year, at \$30.00 per lift (both of which figures shall escalate at 5% per year, compounded, for the 10-year period); and (8) written assurances that CSX and NS will aggressively market and sell Neomodal as if it were their own terminal.

¹⁵⁸ SDB insists that the conditions we granted to protect W&LE will not mitigate the harmful impacts confronting SDB.

or both, shall be submitted to binding arbitration under the procedures adopted in STB Ex Parte No. 560; that the arbitrator shall determine whether the route or the point of interchange, or both, satisfies the requirements of 49 U.S.C. 10705; and that, upon a determination that such requirements have not been satisfied, the arbitrator may award a different route or point of interchange for such traffic. *See, Decision No. 89, 3 S.T.B. at 451.*

In *Decision No. 89*, we determined that the Section III(E) remedies should be extended to single-line to joint-line situations involving a third carrier that is a Class III railroad. "[W]here a Class III railroad could provide through service connecting solely with Conrail, but will now have to provide a three-carrier connecting service with both CSX and NS, the Class III carrier, at its option, will be able to invoke the single-line to joint-line protections set forth in the NITL agreement." *See, Decision No. 89, 3 S.T.B. at 254-55. See also, Decision No. 89, 3 S.T.B. at 388 (ordering paragraph 20; applicants must adhere to the terms of the NITL agreement, subject to our modifications). See also, Decision No. 89, 3 S.T.B. at 388 n.264 (our modifications of the terms of the NITL agreement include the extension of the single-line to joint-line protections to reach shortlines that connect with Conrail and the shippers served by such shortlines).*

RBMN contends that there is an ambiguity in our extension of Section III(E), in that, whereas Section III(E) provides remedies exercisable by shippers, our extension of Section III(E) provides remedies exercisable either: by Class III carriers, *see, Decision No. 89, 3 S.T.B. at 254 (last sentence of the third paragraph)*; or by both Class III carriers and the shippers served by such Class III carriers, *see, Decision No. 89, 3 S.T.B. at 388 n.264 (item b).*

RBMN, which believes that we would be best advised to allow the Section III(E) remedies to be exercisable both by Class III carriers and by the shippers served by such Class III carriers, asks that we clarify ordering paragraph 20 and/or the discussion at 3 S.T.B. page 254 to provide that the single-line to joint-line protections provided by Section III(E) will apply to, and that the Section III(E) remedies will therefore be exercisable by, both Class III railroads and the shippers served by such Class III railroads.

(2) *The Antiassignment Clause Issue: Ordering Paragraphs 8 and 10.* Ordering paragraph 8 states that, except as otherwise provided in *Decision No. 89*, NYC and PRR shall have, upon consummation of the authorized control and the NYC/PRR assignments,¹⁵⁹ all of such right, title, interest in and other use of the assets assigned to NYC and PRR, respectively, as CRC itself had, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral transfer or assignment of such assets to another person or persons, or purporting to affect those rights, titles, interests, and uses in the case of a change of control. *See, Decision No. 89, 3 S.T.B. at 386 (ordering paragraph 8).* Ordering paragraph 10 states that, except as otherwise provided in *Decision No. 89*, CSXT and NSR may use, operate, perform, and enjoy the Allocated Assets and the assets in Shared Assets Areas consisting of assets other than routes (including, without limitation, the Existing Transportation Contracts), as provided for in the application and pursuant to 49 U.S.C. 11321, to the same extent as CRC itself could, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's assignment of its rights to use, operate, perform, and enjoy such assets to another person or persons, or purporting to affect those rights in the case of a change of control. *See, Decision No. 89, 3 S.T.B. at 386 (ordering paragraph 10).* RBMN concedes, in essence: that the "notwithstanding" clauses in ordering paragraphs 8 and 10 can be read as an invocation of the immunizing power of 49

¹⁵⁹ The assignment of certain assets of CRC to NYC to be operated as part of CSXT's rail system and the assignment of certain assets of CRC to PRR to be operated as part of NSR's rail system are referred to collectively as the NYC/PRR assignments. *See, Decision No. 89, 3 S.T.B. at 372.*

U.S.C. 11321(a); and that this invocation of that power has the effect of overriding any provision (e.g., any antiassignment clause) in any law, agreement, etc., that would otherwise have limited or prohibited CRC's unilateral transfer or assignment of the rights covered by ordering paragraphs 8 and 10.

RBMN contends: that, as of June 10, 1997,¹⁶⁰ certain CRC assets had not been allocated to NYC or PRR;¹⁶¹ that one such CRC asset that had not been allocated as of June 10, 1997, was the RBMN/CR agreement dated August 19, 1996 (the Lehigh Agreement, concerning the acquisition by RBMN of its Lehigh Division); and that, as far as RBMN knows, the Lehigh Agreement has still not been allocated.

RBMN further contends: that the Lehigh Agreement contains an antiassignment clause; that applicants, although they sought a general override of antiassignment clauses, did not specifically seek an override of the Lehigh Agreement's antiassignment clause; that applicants have not demonstrated any necessity for an override of the Lehigh Agreement's antiassignment clause,¹⁶² and that, because overrides of negotiated contractual terms are not favored, we should not override antiassignment clauses in agreements that applicants have not yet allocated, and we should not override such clauses at all unless applicants demonstrate that an override is necessary to implementation of the CSX/NS/CR transaction.

RBMN therefore asks: (i) that we clarify ordering paragraph 8 to provide that contracts such as the Lehigh Agreement that were not specified as Allocated Assets in the Transaction Agreement may not be assigned unilaterally to NYC or PRR where a valid antiassignment clause is present, without the consent of the other party to the contract or a showing that the contract is essential to the CSX/NS/CR transaction; and (ii) that we clarify ordering paragraph 10 to provide that CSX and NS may not use or operate such a contract without the consent of the other party to the contract or a showing that the contract is essential to the CSX/NS/CR transaction.

(3) *The Blocking Provision Issue: Ordering Paragraph 39.* Ordering paragraph 39 provides that, "[a]s respects any shortline, such as RBMN, that operates over lines formerly operated over by CSX, NS, or Conrail (or any of their predecessors), and that, in connection with such operations, is subject to a 'blocking' provision: CSX and NS, as appropriate, must enter into an arrangement that has the effect of providing that the reach of such blocking provision is not expanded as a result of the CSX/NS/CR transaction." See, *Decision No. 89*, 3 S.T.B. at 390 (ordering paragraph 39). See also, *Decision No. 89*, 3 S.T.B. at 276-77 (our analysis of the blocking provision issue). The Lehigh Agreement includes a blocking provision. See, *Decision No. 89*, 3 S.T.B. at 426-27 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by RBMN).

¹⁶⁰ The Transaction Agreement is dated as of June 10, 1997. See, CSX/NS-25, Volume 8B at 9.

¹⁶¹ See, CSX/NS-25, Volume 8B at 10, 17-18, 19, and 23 (definition of Allocated Assets, NYC-Allocated Assets, PRR-Allocated Assets, and Unallocated Assets, respectively). The Transaction Agreement contemplates that, in general, the Unallocated Assets (i.e., the assets that had not been allocated as of June 10, 1997) will be allocated to NYC or PRR, or, if appropriate, to CRC, prior to the Closing Date. See, CSX/NS-25, Volume 8B at 29 (Section 2.2(e)).

¹⁶² RBMN adds that no such demonstration would have been possible, because, at the time the CSX/NS/CR application was filed, applicants did not know whether the Lehigh Agreement would be: allocated to NYC; allocated to PRR; or retained by CRC.

RBMN claims that, although it expects that the Lehigh Agreement will either be retained by CRC or allocated to PRR,¹⁶³ RBMN is uncertain as to the identity of the appropriate party with which it is to enter into an arrangement pursuant to ordering paragraph 39. RBMN therefore asks that we clarify that, as respects RBMN, ordering paragraph 39: will apply to whichever entity (presumably either CRC or PRR) is ultimately determined to hold the Lehigh Agreement; and, if that entity is PRR, will also apply to NSR to the extent NSR uses and operates the Lehigh Agreement.¹⁶⁴

The CSX/NS-213 Reply. CSX and NS urge denial of the RBMN-10 petition.

(1) *The Section III(E) Issue.* CSX and NS, which argue that *Decision No. 89* requires no clarification as respects our extension of Section III(E), cite: *Decision No. 89*, 3 S.T.B. at 388 n.264 (which indicates that our extension provides remedies exercisable both by Class III carriers and by the shippers served by such Class III carriers); and *Decision No. 89*, 3 S.T.B. at 254 (which indicates that our extension provides remedies exercisable by Class III carriers). See, *CSX/NS-213* at 3.¹⁶⁵

(2) *The Antiassignment Clause Issue.* CSX and NS, which oppose the clarification sought by RBMN, contend: that the relief encompassed in ordering paragraphs 8 and 10 is necessary to permit the unrestricted assignment of Conrail's assets to NYC and PRR (for use and operation by CSX and NS, respectively),¹⁶⁶ and that the clarification sought by RBMN would cloud the rights of CSX and NS to acquire control of and to use an undetermined but potentially large portion of Conrail's assets. CSX and NS further contend: that the relief encompassed in ordering paragraphs 8 and 10 was sought in the application filed June 23, 1997, and has never previously been opposed by RBMN; that RBMN was fully aware that CSX and NS intended, and were seeking Board authorization, to succeed to Conrail's contractual rights and obligations, including those under the Lehigh Agreement, notwithstanding any relevant antiassignment provision; that, if RBMN had any objection to that relief in connection with the Lehigh Agreement, it should have voiced that objection when it filed its comments and requested conditions; that RBMN has not, until now, requested a condition that would effectively terminate, or allow RBMN to terminate, the Lehigh Agreement; and that RBMN should not be allowed to request such a condition at this stage of the proceeding.

(3) *The Blocking Provision Issue.* CSX and NS, which oppose the clarification sought by RBMN, contend: that, although the basic intent of ordering paragraph 39 is clear, the identity of the proper parties to the arrangements required by ordering paragraph 39 cannot be specified in advance, but will depend on the terms and circumstances of particular agreements and on the entities to which the agreements are allocated; and that we should not become involved in the application of ordering paragraph 39 to particular agreements unless and until some interested party complains that ordering paragraph 39 is not being observed.

THE FCC-18 PETITION. Four Cities contends that the environmental mitigation conditions we imposed in *Decision No. 89* do not adequately address the environmental and safety-related

¹⁶³ The CSX/NS/CR application envisions that all of the Conrail lines with which RBMN connects will be assigned to NS. See, *Decision No. 89*, 3 S.T.B. at 427.

¹⁶⁴ See, *Decision No. 89*, 3 S.T.B. at 227 (NSR: will use and operate the PRR-Allocated Assets; will have the right to receive the benefits of PRR under any contract or agreement included in the PRR-Allocated Assets; and, with the consent of PRR, will have the right to modify or amend any such contract or agreement on behalf of PRR).

¹⁶⁵ CSX and NS apparently prefer the "176 n.264" reading. See, *CSX/NS-213* at 3 (line 10; CSX and NS have underlined the "and the shippers served by such shortlines" clause in *Decision No. 89*, 3 S.T.B. at 388 n.264).

¹⁶⁶ CSX and NS insist that Conrail's rights under contracts such as the Lehigh Agreement are to be allocated either to NYC or to PRR (and therefore, presumably, will not be retained by CRC). See, *CSX/NS-213* at 4-5 (carryover paragraph).

operational impacts that the CSX/NS/CR transaction will inflict on the people of the Four Cities region. See *Decision No. 81*, at 405-06 (Environmental Condition 21). See also *Decision No. 81*, at 176 (ordering paragraph 17; applicants must comply with the environmental mitigation conditions set forth in Appendix Q). See also *Decision No. 81*, at 333-34 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by Four Cities). Four Cities further contends that we have committed, in this proceeding, several material errors (both procedural and substantive in nature) that must be corrected.¹⁶⁷

Relief Sought By Four Cities. The FCC-18 petition raises issues concerning: CSX's representations respecting the B&OCT line segment;¹⁶⁸ environmental justice impacts respecting restoration of rail service on the Clarke Jct.-Hobart line segment;¹⁶⁹ the requirement that applicants must adhere to their representations; and the operational monitoring condition.

(1) *CSX's Representations Respecting The B&OCT Line Segment.* Four Cities contends: that between March 5, 1998, and May 12, 1998, CSX submitted to SEA certain supplemental materials pertaining to traffic movements in the Four Cities region;¹⁷⁰ that, under the procedural schedule applicable to environmental submissions in this proceeding, these supplemental materials should not have been submitted by CSX and should not have been accepted by SEA;¹⁷¹ that, by motion to strike filed May 18, 1998, Four Cities sought to strike the CSX-submitted supplemental materials which (Four Cities claims) had altered the very data upon which Four Cities had relied in assembling its case;¹⁷² that, however, Four Cities' motion was denied by the Board;¹⁷³ and that the supplemental

¹⁶⁷ Four Cities asks that we take corrective action for the reasons stated in its FCC-18 petition and also for the reasons stated in its May 18, 1998, Motion to Strike and in its July 7, 1998, Petition for Clarification and Modification. See FCC-18 at 4 n.2. But, see also *Decision No. 83* (explaining our denial of the May 18th motion); and *Decision No. 89*, 3 S.T.B. at 217 n.37 (explaining why we did not act, and will not act, upon the requests for clarification or reconsideration that were submitted after the voting conference but before the service date of *Decision No. 89*).

¹⁶⁸ The C-023 (Barr Yard-Pine Jct.) line segment is herein referred to as The Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT) line segment.

¹⁶⁹ The Clarke Jct.-Hobart line segment, which Four Cities refers to as "the former PRR line" (because it was once a Pennsylvania Railroad line), consists of: (1) the C-024 (Clark Jct.-Tolleston) line segment; and (2) the Tolleston-Hobart portion of the C-026 (Tolleston-Warsaw) line segment.

¹⁷⁰ Four Cities claims that the supplemental materials submitted by CSX included: a supplemental environmental report containing material changes to CSX's operating plan, including its post-transaction operations for the B&OCT line segment; and a supplemental verified statement clarifying CSX's operating plan.

¹⁷¹ See, *Notice of Final Scope of Environmental Impact Statement*, 62 Fed. Reg. 51,500, 51,503 (1997) ("Environmental comments not received in accordance with the 45-day comment period for the Draft EIS will not be incorporated into the Final EIS."). See also *Decision No. 62*, at 1 (the Draft EIS was served on December 12, 1997; public comments on the Draft EIS were due to SEA by February 2, 1998).

¹⁷² Four Cities, which argued that it had not had an adequate opportunity to review the supplemental materials and to respond to them, and that it would therefore be severely prejudiced by SEA's acceptance of these supplemental materials, asked that the Board: strike the supplemental materials from the record; or hold in abeyance completion and publication of the Final EIS and the Board's oral argument and voting conference in order to allow Four Cities an opportunity to obtain additional information and to file a response. Four Cities also argued that its rights had been

(continued...)

materials that had been submitted by CSX were incorporated into both the Final EIS¹⁷⁴ and *Decision No. 89*.¹⁷⁵ Four Cities further contends: that we erred in denying Four Cities an opportunity to submit additional comments of its own in time to affect the outcome of the Final EIS and *Decision No. 89*; and that, because the supplemental materials submitted by CSX were included in the Final EIS, and were incorporated in *Decision No. 89* and used to help justify the environmental conditions we imposed in *Decision No. 89*, we must ensure that CSX is held accountable for its representations respecting the B&OCT line segment. Four Cities therefore asks that we clarify that CSX will be held to its revised representations (i.e., the representations contained in the supplemental materials that Four Cities sought to strike) respecting train traffic levels on the B&OCT line segment.

(2) *Environmental Justice Impacts Respecting Restoration Of Rail Service On The Clarke Jct.-Hobart Line Segment*. Four Cities contends: that the Clarke Jct.-Hobart line segment, which runs through the heart of Gary, has been inactive for 10 years; that the CSX/NS/CR transaction contemplates the restoration, by CSX, of rail service on this line segment; and that restoration of rail service on this line segment will have significant environmental justice impacts on minority and low-income populations in Gary. Four Cities further contends that we have totally ignored, for mitigation purposes, these significant environmental justice impacts, even though it would be possible (Four Cities claims) to fully mitigate such impacts.¹⁷⁶ Four Cities therefore insists: that we should require applicants to suspend any action to restore the Clarke Jct.-Hobart line segment to service, at least until we have conducted an investigation of the appropriate mitigation action necessary to remedy the environmental justice impacts of such restoration; and that, at the very least, we should impose safety and noise mitigation at the Roosevelt Manor low- to moderate-income housing project site (which, Four Cities indicates, is bounded on the north by the Clarke Jct.-Hobart line segment).

(3) *Requirement That Applicants Must Adhere To Their Representations*. We indicated, in *Decision No. 89*, that applicants will be required to adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in *Decision No. 89*. See, *Decision No. 89*, 3 S.T.B. at 387 (ordering paragraph 19). See also,

¹⁷² (...continued)

violated, and its predicament aggravated, by CSX's failure to supplement its prior discovery responses (a failure, Four Cities claimed, that violated the applicable discovery rules).

¹⁷³ See, *Decision No. 83*.

¹⁷⁴ The Final EIS was served on May 22, 1998. Four Cities contends that SEA's recommended mitigation for the Four Cities region was based, at least in part, on its conclusion that CSX's newly submitted revised daily train traffic figures would help remedy the critical rail/highway grade crossing congestion situation on the B&OCT line segment.

¹⁷⁵ See, *Decision No. 89*, 3 S.T.B. at 357 & n.239 (noting, in general, that applicants had proposed voluntary mitigation options addressing environmental concerns of certain affected communities, which SEA had considered in developing final mitigation recommendations in the Final EIS; and noting, in particular, that, in the Four Cities region, CSX had agreed to make operational improvements and had offered to reroute trains away from the Barr Yard-Pine Jct. line segment).

¹⁷⁶ See, *Decision No. 89*, 3 S.T.B. at 521 (the second prong of Four Cities' Alternative Routing Plan addresses Four Cities' concerns respecting restoration of rail service on the Clarke Jct.-Hobart line segment).

Decision No. 89, 3 S.T.B. at 213 n.26 (similar statement).¹⁷⁷ Four Cities, which believes that this requirement lacks specificity, contends that, to ensure the success of the environmental mitigation we imposed in *Decision No. 89*¹⁷⁸ and to protect the Four Cities region from the harms associated with post-transaction rail traffic volumes above the levels represented by applicants both in their Operating Plans and in their later filings, it is imperative that applicants be held to their representations with respect to rail traffic volumes and daily train frequencies on critical line segments. Four Cities therefore asks that we clarify that, to the extent that applicants and the Four Cities cannot negotiate a mutual resolution as to individual line segment traffic levels, applicants will be held to their representations as to post-transaction traffic levels and daily train frequencies “at least on the most critical line segments in the Four Cities”¹⁷⁹ where the Board has determined that the transaction will cause significant environmental impacts.” FCC-18 at 13-14.¹⁸⁰

(4) *Operational Monitoring Condition*. Four Cities contends that the operational monitoring condition we imposed in *Decision No. 89* is deficient in several crucial respects. See, *Decision No. 89*, 3 S.T.B. at 366-71 (our operational monitoring condition requires applicants to file periodic status reports and progress reports). See also, *Decision No. 89*, 3 S.T.B. at 387 (ordering paragraph 18).

(4a) *Operational Monitoring Condition: Elements 10 and 11: Public Filing*. Four Cities notes that most of the reports, and certain incidental transmittal letters as well, that will be submitted by applicants will be placed in the docket (*i.e.*, the public docket) as they are filed.¹⁸¹ Four Cities further notes, however: that the reports and transmittal letters submitted under reporting element 11 (yards and terminals) will not be placed in the public docket; and that, although the transmittal letters submitted under reporting element 10 (Chicago gateway operations) will be placed in the public docket, the reports submitted under reporting element 10 will not be placed in the public docket.¹⁸² Four Cities contends that the public dissemination of the construction and operational information required by reporting elements 10 and 11 will be vital in keeping communities, the media, public officials, etc., apprised of important service performance indicators, and may assist communities such as the Four Cities: in monitoring applicants’ progress toward achieving promised improvements in

¹⁷⁷ See also, *Decision No. 89*, 3 S.T.B. at 217 n.36 (our oversight will include applicants’ adherence to the various representations they made on the record during the course of this proceeding). See also, *Decision No. 89*, 3 S.T.B. at 366 and 385 n.262 (similar statements).

¹⁷⁸ See, especially, *Decision No. 89*, 3 S.T.B. at 592-94 (Environmental Condition 21).

¹⁷⁹ Four Cities has in mind that the B&OCT line segment is one of these “most critical” line segments. See, FCC-18 at 12.

¹⁸⁰ The clarification sought by Four Cities with regard to CSX’s representations respecting the B&OCT line segment (hereinafter referred to as the B&OCT clarification) and the clarification sought by Four Cities with regard to the requirement that applicants must adhere to their representations (hereinafter referred to as the general clarification) are similar but different. The two sought clarifications are similar in that, as respects the B&OCT line segment, the two seek essentially the same relief: a statement that CSX will be held to its representations respecting the B&OCT line segment. The two sought clarifications are different in two respects: (1) the B&OCT clarification applies only to the B&OCT line segment, whereas the general clarification applies to the B&OCT line segment and other critical line segments; and (2) the B&OCT clarification is premised upon the notion that we erred in denying Four Cities’ May 18th motion to strike, whereas the general clarification is premised upon our *Decision No. 89* requirement that applicants adhere to their representations.

¹⁸¹ See, *Decision No. 89*, 3 S.T.B. at 370-71 (reporting element 15).

¹⁸² See, *Decision No. 89*, 3 S.T.B. at 369-71 (reporting elements 10, 11, and 15).

rail operations; and in making decisions concerning corrective actions that may be needed to remedy any problems that develop. Four Cities therefore asks that we modify *Decision No. 89* by requiring that the reports and transmittal letters submitted under reporting elements 10 and 11 be placed in the public docket.¹⁸³

(4b) *Operational Monitoring Condition: Element 10: Scope.* Four Cities notes that reporting element 10 requires applicants to report weekly on the number and on-time delivery of run-through trains delivered to western carriers via the Chicago gateway.¹⁸⁴ Four Cities claims, however, that, by requiring applicants to report only on run-through trains interchanged with western carriers, and not on all through (non-local) trains, we will not be seeing the entire picture on system flow and the state of traffic congestion in the region. Four Cities therefore asks that we augment reporting element 10 by requiring applicants to report on all through train operations in the Chicago area.¹⁸⁵

(4c) *Operational Monitoring Condition: Rail Lines In Northwest Indiana.* Four Cities contends: that our refusal to impose all of the environmental mitigation measures requested by Four Cities was largely based on applicants' assurances that certain planned operational and construction-related improvements will more than offset the transaction's harms in the Four Cities region; that, furthermore, the environmental mitigation measures we adopted, as applicable to the Four Cities region, are to a large degree either non-binding on applicants or qualified by language such as "to the extent practicable"; and that, given these circumstances, the reporting requirements we imposed in *Decision No. 89* are too limited to allow Four Cities to determine whether either the improvements promised by applicants or the mitigation measures we imposed are actually being implemented. Four Cities therefore asks that we require applicants to provide, on a monthly basis, reports¹⁸⁶ containing the following additional information:¹⁸⁷ (1) on a daily average basis (calculated monthly), the number of trains per day (run through and local) operated in both directions, and separately in each direction, over four critical line segments;¹⁸⁸ (2) on a daily average basis (calculated monthly), the average speed of trains (run through and local) operating over the State Line Tower-Pine Jct. portion of the C-023 (Barr Yard-Pine Jct.) line segment;¹⁸⁹ (3) the status of CSX's project to restore to service and upgrade the C-024 (Clarke Jct.-Tolleston) line segment and the Tolleston-Hobart portion of the C-026 (Tolleston-Warsaw) line segment, in the event that we determine, based on further review, that these currently inactive line segments may be restored to service; and (4) a detailed

¹⁸³ Four Cities does not explicitly reference "reporting elements 10 and 11," but it is clear that these are the reporting elements that Four Cities has in mind. See, FCC-18 at 15-16.

¹⁸⁴ See, *Decision No. 89*, 3 S.T.B. at 369-70 (reporting element 10).

¹⁸⁵ Four Cities does not explicitly reference "reporting element 10," but it is clear that this is the reporting element that Four Cities has in mind. See, FCC-18 at 16-17.

¹⁸⁶ Four Cities contemplates that these reports would either be submitted to the Four Cities or filed publicly.

¹⁸⁷ Four Cities insists that only with this additional information will the Four Cities be able to determine whether applicants are complying fully with *Decision No. 89* and fulfilling their pledge to mitigate transaction-related environmental impacts in northwest Indiana.

¹⁸⁸ The specified line segments are: the State Line Tower-Pine Jct. portion of the C-023 (Barr Yard-Pine Jct.) line segment; the C-024 (Clarke Jct.-Tolleston) line segment; the Tolleston-Hobart portion of the C-026 (Tolleston-Warsaw) line segment; and the State Line Tower-Hobart portion of the N-469 (Burnham Yard-Hobart) line segment.

¹⁸⁹ Four Cities adds: that, for westbound trains, the speed should be calculated on an average miles-per-hour basis based on the recorded time of train departure from Pine Jct. and the recorded time of train passing through the interlocker at State Line Tower, divided by the length of the line segment; and vice versa for eastbound trains.

description of applicants' compliance with the environmental conditions we imposed at Appendix Q of *Decision No. 89*,¹⁹⁰ including the nine sub-parts of Environmental Condition 21,¹⁹¹ and also including Environmental Conditions 1,¹⁹² 6,¹⁹³ and 8¹⁹⁴ as applicable.

The CSX/NS-217 Response. CSX and NS urge denial of the FCC-18 petition.

(1) *CSX's Representations Respecting The B&OCT Line Segment.* CSX and NS contend: that the revisions contained in the supplemental materials submitted by CSX did not materially affect our analysis; that, furthermore, the revised figures, much like the original figures, were only projections of traffic changes, not ironclad commitments; and that, in any event, Four Cities has had, in its FCC-18 petition, an ample opportunity to respond to the substance of the revisions contained in the supplemental materials. And, CSX and NS add, Environmental Condition 50 should assure Four Cities that it will not be without recourse even if (as Four Cities fears) CSX's projection of traffic on the Barr Yard-Pine Jct. line segment (either the original projection or the revised projection) turns out not to be accurate.¹⁹⁵

(2) *Environmental Justice Impacts Respecting Restoration Of Rail Service On The Clarke Jct.-Hobart Line Segment.* CSX and NS contend: that SEA correctly evaluated the relevant environmental justice impacts;¹⁹⁶ that, as SEA concluded, the projected impacts on minority and/or low-income populations will not be disproportionately high; and that, in any event, Four Cities has not properly sought a stay of *Decision No. 89*, insofar as that decision permits implementation of operations over the Clarke Jct.-Hobart line segment. CSX and NS add: that, because operations will be conducted in compliance with Environmental Conditions 21(b) and 21(d)¹⁹⁷ and all applicable regulations, the Four Cities will not be harmed by rehabilitation of, and subsequent operations over, the Clarke Jct.-Hobart line segment; that, however, because this line segment is a portion of the Fort Wayne Line and because the Fort Wayne Line is an important component of CSX's operating plan for its Chicago terminal area traffic flows, CSX would be seriously harmed if it were unable to use the Clarke Jct.-Hobart line segment; and that the public interest in efficient train operations through the Chicago terminal area does not support a stay of operations over the Clarke Jct.-Hobart line segment.

(3) *Requirement That Applicants Must Adhere To Their Representations.* CSX and NS insist that their "representations" respecting traffic projections were good-faith projections, not ironclad commitments to which they must adhere forever more, and that the imposition of a cap on the number of trains that they may operate over their various lines through the Four City area would impose unworkable constraints on fundamental common carrier requirements.

(4) *Operational Monitoring Condition.* As respects Four Cities' request that the reports and transmittal letters submitted under reporting elements 10 and 11 be placed in the public docket, CSX

¹⁹⁰ See, *Decision No. 89*, 3 S.T.B. at 567-610.

¹⁹¹ See, *Decision No. 89*, 3 S.T.B. at 592-594.

¹⁹² See, *Decision No. 89*, 3 S.T.B. at 567-70.

¹⁹³ See, *Decision No. 89*, 3 S.T.B. at 576-78.

¹⁹⁴ See, *Decision No. 89*, 3 S.T.B. at 580-87.

¹⁹⁵ Environmental Condition 50 provides that "[i]f there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions in this Decision, and upon petition by any party who demonstrates such material changes, the Board may review the continuing applicability of its final mitigation, if warranted." See, *Decision No. 89*, 3 S.T.B. at 607.

¹⁹⁶ CSX and NS insist that there is, as respects such impacts, no inconsistency between the Draft EIS and the Final EIS.

¹⁹⁷ See, *Decision No. 89*, 3 S.T.B. at 593.

and NS contend: that this information is commercially sensitive, and could be used to the disadvantage of CSX and NS by competitors not subject to similar disclosure requirements; that we should not allow our operational monitoring requirements to be used for purposes other than assessing service performance; and that, in any event, Four Cities has no legitimate need for most of this information, because our operational monitoring requirements are designed to assess the quality of rail service, not vehicle delay on particular line segments. As respects Four Cities' requests that reporting element 10 be augmented and that applicants be required to provide monthly reports containing certain additional information, CSX and NS contend that we should, at the present time, allow CSX, NS, and Four Cities to work out appropriate information reporting requirements under the auspices of Environmental Condition 21(i).¹⁹⁸

Prairie Group's August 31st Statement. Prairie Group indicates that it supports Four Cities' request for modification of the operational monitoring condition. Public dissemination of the information required under reporting element 11, Prairie Group claims, is vital to keeping the shipping communities, the media, and public officials apprised of important service performance indicators.¹⁹⁹

The IMRL-9 Reply. I&M urges approval of Four Cities' request for modification of the operational monitoring condition insofar as that request relates to the public availability of information to be reported by applicants on the Chicago switching district and the IHB. Public dissemination of this information, I&M claims, is essential if our stated intentions with respect to the IHB²⁰⁰ are to be effectively and credibly carried out.

NJT's AUGUST 12th LETTER. NJT seeks: correction of certain asserted factual errors; and modification of Environmental Condition 4(A).

Relief Sought By NJT. (1) *North Jersey Terminal: Factual Errors.* NJT notes that, in *Decision No. 89*, our descriptions of the NYC-Allocated Assets and the PRR-Allocated Assets²⁰¹ include references to routes originating or terminating at NJ Terminal,²⁰² North NJ Terminal,²⁰³ and North Jersey Terminal.²⁰⁴ NJT asks that *Decision No. 89* be clarified to reflect that Conrail does not have rights over, and that, therefore, the cited references do not include, the two-mile segment of NJT-owned railroad between West End, NJ, and Hoboken, NJ.

(2) *North Jersey Lines: Factual Errors.* NJT notes that, in *Decision No. 89*, our description of the PRR-Allocated Assets includes the following segments of Conrail's "NJ Terminal to Crestline" route: "(a) North NJ Terminal to Allentown, PA, via Somerville, NJ, (b) Little Falls, NJ, to Dover, NJ (TR), (c) Orange, NJ, to Denville, NJ (TR), (d) Dover to Rockport (TR), (e) Rockport to E. Stroudsburg via Phillipsburg, NJ, (f) Allentown Terminal, (g) Orange to NJ Terminal (TR), (h) NJ Terminal to Little Falls (TR), (i) Bound Brook to Ludlow, NJ (TR)." See, *Decision No. 89*, 3 S.T.B. at 223 (these are the first nine sub-items of item 1; routes assertedly operated by Conrail pursuant to trackage rights have been designated "TR").

¹⁹⁸ See, *Decision No. 89*, 3 S.T.B. at 594.

¹⁹⁹ It is not entirely clear whether Prairie Group's support for Four Cities' request for modification of the operational monitoring condition extends beyond public disclosure of the information required under reporting element 11.

²⁰⁰ See, *Decision No. 89*, 3 S.T.B. at 292: "Applicants have represented that IHB will continue to be managed as a neutral switching carrier, just as it was managed by Conrail before this transaction. We will hold applicants to that representation."

²⁰¹ See, *Decision No. 89*, 3 S.T.B. at 221-225.

²⁰² See, *Decision No. 89*, 3 S.T.B. at 223 (item 1).

²⁰³ See, *Decision No. 89*, 3 S.T.B. at 221-22 (items 1 and 6) and 223 (item 1).

²⁰⁴ See, *Decision No. 89*, 3 S.T.B. at 224 (item 7).

NJT contends that sub-items (a), (c), (d), (g), and (i) should be modified and/or clarified.

As respects sub-item (a), NJT claims that Somerville: is part of the NJT Raritan Valley Line; and is included in the segment described in sub-item (i). NJT therefore insists that sub-item (a) should be revised to read: "North NJ Terminal to Allentown, PA, via Bound Brook/Port Reading Jct./Royce."

As respects sub-item (c), NJT claims that Conrail does not have rights between Orange and Summit. NJT therefore insists that sub-item (c) should be revised to read: "Summit, NJ, to Denville, NJ (TR)."

As respects sub-item (d), NJT claims that Conrail: has trackage rights over the segment between Dover and Netcong; and owns the segment between Netcong and Rockport. NJT therefore insists that sub-item (d) should be revised to read: "Dover to Netcong (TR); Netcong to Rockport."

As respects sub-item (g), NJT claims that Conrail does not have rights over the segment between Orange and Roseville Avenue. NJT therefore insists that sub-item (g) should be revised to read: "Roseville Avenue to NJ Terminal (TR)."

As respects sub-item (i), NJT claims that Conrail does not have rights over the segment between High Bridge and Ludlow, which segment (NJT adds) is part of NJT's Raritan Valley Line. NJT therefore insists that sub-item (i) should be revised to read: "Bound Brook to High Bridge, NJ (TR)."²⁰⁵

(3) *Environmental Condition 4(A)*. Environmental Condition 4(A) provides that applicants, before increasing the number of rail cars carrying hazardous materials on the line segments that will become "key routes" as a result of the CSX/NS/CR transaction, and for a period of at least 3 years from the effective date of *Decision No. 89*, must certify to the Board compliance with the key route guidelines of the Association of American Railroads (AAR). See, *Decision No. 89*, 3 S.T.B. at 571-74. NJT contends: that, based on data submitted by applicants, Environmental Condition 4(A) has not been made applicable to the line segments between Suffern, NY, and Croxton, NJ; that, however, there appears to be a major inaccuracy in these data, in that these data assume, in essence, that none of the hazardous materials carloads that will traverse the Campbell Hall-Suffern segment will also traverse the segments between Suffern and Croxton; and that this assumption is simply implausible. NJT therefore seeks modification of Environmental Condition 4(A)²⁰⁶ to include two additional line segments: the N-064 (Suffern, NY-Ridgewood Jct., NJ) line segment; and the N-050 (Ridgewood Jct., NJ-Croxton, NJ) line segment.²⁰⁷ NJT argues that this extension of Environmental Condition 4(A) is necessitated by safety concerns which are particularly important in the densely populated area between Suffern and Croxton where NS freight trains and NJT commuter trains will both operate.

²⁰⁵ NJT adds, in passing, that it would appear that the Bound Brook-High Bridge segment has been allocated both to PRR and to the North Jersey SAA. Compare, *Decision No. 89*, 3 S.T.B. at 223 (item 1, sub-item (i), as revised by NJT, indicates that the PRR-Allocated Assets include the Bound Brook-High Bridge segment), with *Decision No. 89*, 3 S.T.B. at 228 (item 1, sub-item (c), indicates that the North Jersey SAA encompasses the rights of Conrail on the NJT Raritan line).

²⁰⁶ NJT's request for modification of Environmental Condition 4(A) also includes those portions of Environmental Conditions 4(B) and 5(A) that are applicable to "key routes." See, *Decision No. 89*, 3 S.T.B. at 574 (Environmental Condition 4(B)) and at 576 (Environmental Condition 5(A)).

²⁰⁷ NJT adds that its request for modification of Environmental Condition 4(A) applies to each of the three alternative routings between Suffern and Croxton.

The CSX/NS-214 Reply. The Asserted Factual Errors. CSX and NS contend: that the essence of NJT's asserted factual errors as respects the North Jersey Terminal is the claim that Conrail does not have rights between West End and Hoboken; that the essence of NJT's asserted factual errors as respects the North Jersey Lines is the claim that Conrail does not have rights between Orange and Summit,²⁰⁸ between Orange and Roseville Avenue,²⁰⁹ and between High Bridge and Ludlow,²¹⁰ that NJT has presented no evidence to support these claims, which (CSX and NS insist) are not factually accurate;²¹¹ that, in any event, NJT should have raised its claims long before *Decision No. 89* was issued;²¹² and that, even if NJT's claims are factually accurate, there is still no need to clarify or modify *Decision No. 89*, because *Decision No. 89* authorizes the allocation of Conrail's assets, and no other entity's assets, to NYC and PRR.²¹³ CSX and NS therefore urge that we not make the clarifications and/or modifications sought by NJT.

Environmental Condition 4(A). CSX and NS indicate: that they agree that the Final EIS understated the volumes of annual carloads of hazardous materials that will traverse the N-064 and N-050 line segments post-transaction; and that, for this reason, they do not oppose classification of these two segments as "key routes" for purposes of Environmental Condition 4(A) and the related portions of Environmental Conditions 4(B) and 5(A).

LAL's AUGUST 4th LETTER. LAL seeks correction of an asserted factual error.²¹⁴

Relief Sought By LAL. LAL notes that, in *Decision No. 89*, our description of the NYC-Allocated Assets includes the following segments of Conrail's "NY/NJ Area to Cleveland" route: "(u) Mortimer, NY, to Avon, NY, and (v) Rochester Branch, NY." See, *Decision No. 89*, 3 S.T.B. at 222 (these are the last two sub-items of item 1). LAL contends that these routes are no longer owned or operated by Conrail, and that LAL now owns and operates the lines formerly owned by Conrail: between Genesee Junction Yard in Chili, NY (MP 361.59) and Mortimer, NY (track 227, parallel to and formerly part of Conrail's West Shore Branch); between Mortimer, NY, and Avon, NY (formerly Conrail's Mortimer Secondary); and between Mortimer, NY, and Henrietta, NY (formerly part of Conrail's Rochester Industrial Track). LAL therefore asks, in essence, that we correct our description of Conrail's "NY/NJ Area to Cleveland" route to reflect the present ownership of the Mortimer-Avon and Rochester Branch segments.

CG&C's JULY 22nd REQUEST. CG&C asks that we make approval of the CSX/NS/CR application subject to the terms of the CG&C/CSX settlement agreement.

²⁰⁸ This has reference to sub-item (c) of the "NJ Terminal to Crestline" route.

²⁰⁹ This has reference to sub-item (g) of the "NJ Terminal to Crestline" route.

²¹⁰ This has reference to sub-item (i) of the "NJ Terminal to Crestline" route.

²¹¹ CSX and NS, however, have not addressed NJT's claims with respect to sub-items (a) and (d) of the "NJ Terminal to Crestline" route.

²¹² CSX and NS note that the *Decision No. 89* descriptions of the NYC-Allocated Assets and the PRR-Allocated Assets were taken verbatim from the CSX/NS/CR application itself. See, CSX/NS-18 at 35-38 (filed June 23, 1997).

²¹³ CSX and NS concede: that, because the exact scope of Conrail's trackage rights is established by trackage rights agreements, those rights will neither be enlarged nor diminished by the general descriptions of Conrail's routes in *Decision No. 89*; and that any disputes that may arise as to the exact scope of Conrail's rights under its trackage rights agreements can be resolved elsewhere.

²¹⁴ See, generally, *Decision No. 89*, 3 S.T.B. at 418-19 (summary of the evidence and arguments, and the related requests for affirmative relief, submitted by LAL).

Relief Sought By CG&C. In its comments filed on October 21, 1997, CG&C, a municipal gas utility serving customers in Indianapolis (Marion County), IN, argued that the CSX/NS/CR transaction might well result in a substantial increase in the railroad freight rates applicable to traffic moving from/to Indianapolis, and therefore asked that we impose upon any approval of the CSX/NS/CR application a condition to assure essentially equal access by CSX and NS to all parts of Indianapolis on a cost-neutral basis. CG&C, however, is not mentioned in *Decision No. 89*, because, on the first day (June 3, 1998) of the oral argument we held in this proceeding, CG&C announced that, in view of the fact that it had (earlier that very day) reached an agreement with CSX, it was withdrawing its conditions request.

Now, by request filed July 22, 1998 (one day prior to the service date of *Decision No. 89*, but too late to be referenced therein),²¹⁵ CG&C asks that we allow it to withdraw its opposition comments (i.e., the comments filed on October 21, 1997) "on condition that the Board order that approval of the Joint Application by the Board is subject to the terms of a Settlement Agreement entered into June 3, 1998, between Citizens Gas & Coke Utility and CSX." CG&C adds, in its July 22nd request, that "[t]he terms of the Agreement between the Parties are confidential; accordingly, the Settlement Agreement is not provided to the Board."

²¹⁵ The request itself is not dated; we received it on July 22nd.

APPENDIX B: REVISED ENVIRONMENTAL CONDITIONS

Condition 4(A). Before increasing the number of rail cars carrying hazardous materials on the 44 rail line segments listed below that would become "key routes" as a result of the proposed Conrail Acquisition, and for a period of at least 3 years from the effective date of the Board's decision, the Applicants shall certify to the Board compliance with Association of American Railroads (AAR) key route guidelines on these rail line segments. (See, "Recommended Railroad Operating Practices for Transportation of Hazardous Materials," AAR Circular No. OT-55-B.)

RAIL LINE SEGMENTS THAT WARRANT
HAZARDOUS MATERIALS (KEY ROUTE) MITIGATION

Proposed Owner	Route and Segment(s)	Rail Line Segment ID
CSX	Manchester, Georgia—Parkwood, Alabama	
CSX	La Grange, GA to Parkwood, AL	C-376
CSX	Manchester, GA to La Grange, GA	C-377
CSX	Relay, Maryland—Washington, D.C.	
CSX	Relay, MD to Jessup, MD	C-037
CSX	Jessup, MD to Alexandria Jct., MD	C-034
CSX	Alexandria Jct., MD to Washington, DC	C-031
CSX	Trenton, NJ to Port Reading, NJ	C-769
CSX	Ashley Junction, SC to Yemassee, SC	C-344
CSX	Quaker, Ohio—Berea, Ohio	
CSX	Quaker, OH to Mayfield, OH	C-073
CSX	Mayfield, OH to Marcy, OH	C-072
CSX	Marcy, OH to Short, OH	C-069
CSX	Short, OH to Berea, OH	C-074
CSX	NJ Cabin, KY to Columbus, OH	C-230

RAIL LINE SEGMENTS THAT WARRANT
HAZARDOUS MATERIALS (KEY ROUTE) MITIGATION

Proposed Owner	Route and Segment(s)	Rail Line Segment ID
	Columbus, Ohio—Toledo, Ohio	
CSX	Columbus, OH to Marion, OH	C-229
CSX	Marion, OH to Fostoria, OH	C-070
CSX	Fostoria, OH to Toledo, OH	C-228
CSX	Deshler, OH to Toledo, OH	C-065
	West Falls, Pennsylvania—Trenton, New Jersey	
CSX	West Falls, PA to CP Newton Jct., PA	C-766
CSX	CP Newton Jct., PA to CP Wood, PA	C-767
CSX	CP Wood, PA to Trenton, NJ	C-768
	Salisbury, North Carolina—Leadvale, Tennessee	
NS	Salisbury, NC to Asheville, NC	N-360
NS	Asheville, NC to Leadvale, TN	N-361
NS	New Line, TN to Leadvale, TN	N-392
NS	Bulls Gap, TN to Frisco, TN	N-399
NS	Frisco, TN to Kingsport, TN	N-406
	Croton, New Jersey—Buffalo, New York	
NS	Croton, NJ to Ridgewood Jct., NJ	N-050
NS	Ridgewood Jct., NJ to Suffern, NY	N-064
NS	Suffern, NY to Campbell Hall, NY	N-062
NS	Campbell Hall, NY to Port Jervis, NY	N-063
NS	Port Jervis, NY to Binghamton, NY	N-245

3 S.T.B.

RAIL LINE SEGMENTS THAT WARRANT
HAZARDOUS MATERIALS (KEY ROUTE) MITIGATION

Proposed Owner	Route and Segment(s)	Rail Line Segment ID
NS	Binghamton, NY to Waverly, NY	N-246
NS	Waverly, NY to Coming, NY	N-247
NS	Coming, NY to Buffalo, NY	N-065
NS	Ebenezer Jct., NY to Buffalo, NY	N-061
NS	Butler, IN to Fort Wayne, IN	N-041
NS	Alexandria, IN to Muncie, IN	N-040
NS	Moberly, MO to CA Junction, MO	N-478
NS	Buffalo FW, New York—Cleveland, Ohio	
NS	Buffalo FW, NY to Ashtabula, OH	N-070
NS	Ashtabula, OH to Cleveland (Cloggsville), OH	N-075
NS	Cleveland (Cloggsville), OH to CP-190, OH	N-074
	Vermilion, Ohio—Oak Harbor, OH	
NS	Vermilion, OH to Bellevue, OH	N-072
NS	Oak Harbor, OH to Bellevue, OH	N-079
NS	Bethlehem, PA to Allentown, PA	N-203
NS	Reading, PA to Reading Belt Jct., PA	N-216
NS	Poe ML, VA to Petersburg, VA	N-432
	Park Junction, Pennsylvania—Camden, New Jersey	
Shared	Park Jct., PA to Philadelphia Frankford Jct., PA	S-232
Shared	Philadelphia Frankford Jct., PA to Camden, NJ	S-233

Condition 21.

- i) The Applicants shall attend regularly scheduled meetings with representatives of the Four City Consortium for 3 years following the effective date of the Board's final decision. Representatives of the Indiana Harbor Belt Railroad shall also be invited. These meetings would provide a forum for assessing traffic delay, emergency response, and driver compliance with railway grade crossing warning systems through improved education and enforcement. At each meeting, the Applicants shall provide a status report on average train traffic volumes and speeds on rail line segments C-023, C-024, and the applicable portions of C-026, and N-469, and on the progress of operational and capital improvements required by the Board to address highway/rail at-grade crossing safety and delay issues in the Four City Consortium area.

Condition 26(C).

The Applicants shall install and maintain additional train defect detection devices to scan all their trains entering the Greater Cleveland Area, as specified below.

ENHANCED TRAIN DEFECT DETECTION - GREATER CLEVELAND AREA

Proposed Owner	Nearest Community	Rail Line Segment	Approx. Railroad Milepost (MP)	Proposed Improvements at Existing Defect Detector Locations		Proposed New Defect Detector Locations & Improvements
				Existing Detection	Proposed Detection	
CSX	Wickliffe	C-060	165	HBD DED	HWI	-
CSX	Collinwood	C-060	179	HBD DED	NONE	-
CSX	Olmsted Falls*	C-061	19	HBD DED	HWI WILD*	-
CSX	Marcy	C-069	10	-	-	HBD DED
NS	Wickliffe	N-075	169	HBD DED	HWI WILD	-
NS	Cloggsville	N-075	185	See**	-	Track 2: HBD DED
NS	Bay Village	N-080	201	HBD DED	HWI WILD	-

3 S.T.B.

ENHANCED TRAIN DEFECT DETECTION - GREATER CLEVELAND AREA

Proposed Owner	Nearest Community	Rail Line Segment	Approx. Railroad Milepost (MP)	Proposed Improvements at Existing Defect Detector Locations		Proposed New Defect Detector Locations & Improvements
				Existing Detection	Proposed Detection	
NS	Cleveland	N-293	186	-	-	HBD DED
NS	Olmsted Falls	N-293	200	HBD DED	HWI WILD	-
NS	White	N-081	113	Track 1: HBD DED	Track 1: HWI WILD	Track 2: HBD HWI DED WILD

HBD = Hot Bearing Detector
 DED = Dragging Equipment Detector
 HWI = Shifted Load/High-Wide Indicator
 WILD = Wheel Impact Load Detector

* Exact location for the WILD to be determined by the Applicants' engineering and operations departments, but at a distance no greater than 60 miles from Cleveland. Coverage on all main tracks (including double tracks) is required. However, if CSX determines, based on its further detailed analysis of engineering and operational criteria, that a WILD would function most effectively and with the least disruption to efficient traffic flows at a different location more than 60 miles from Cleveland, or on a different line segment, CSX would have to request the Board's approval for that location and file information with the Board and the City of Cleveland to support its request.

** Detector at milepost 185 to be relocated from existing location (now at milepost 186). Relocation is necessary to monitor trains using both the Cloggsville and West Shore corridors. HBD and DED are required on both tracks at this location.